Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit's rejection of the Tennessee Supreme Court's 2004 determination that respondent Gregory Thompson is competent to be executed conflicts with 28 U.S.C. § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362 (2000), where *Ford v. Wainwright*, 477 U.S. 399 (1986), neither defined competency in the Eighth Amendment context nor set forth precise procedural requirements for determining competency for execution.

2. Whether the Sixth Circuit erred in concluding, contrary to *Gonzalez v. Crosby*, 545 U.S. 524 (2005), that the Tennessee Supreme Court's 2001 clarification of existing Tennessee appellate procedure was sufficient to warrant relief under Fed. R. Civ. P. 60(b) from the district court's judgment denying respondent Thompson's petition for writ of habeas corpus.

3. Whether the Sixth Circuit's decision exceeds the scope of the certificate of appealability ("COA") — and thus the Court's jurisdiction — under 28 U.S.C. § 2253(c) and conflicts with this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where it rejected the district court's alternate untimeliness determination as to Thompson's Fed. R. Civ. P. 60(b) motion, after specifically declining to grant a COA on that question

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of this Court.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Tennessee, on behalf of Ricky Bell, Warden, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit remanding two separate federal habeas corpus proceedings to the United States District Court for the Eastern District of Tennessee for further proceedings.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a) that is the subject of this petition is published at 580 F.3d 423. The memorandum opinion of the district court dismissing respondent Gregory Thompson's petition for writ of habeas corpus challenging his competency for execution is unreported. (Pet. App. 66a). The order of the district court denying Thompson's motion for relief from judgment under Fed. R. Civ. P. 60(b) is unreported. (Pet. App. 158a).

The decision of the Tennessee Supreme Court adjudicating Thompson's competency for execution in 2004 is reported at 134 S.W.3d 168. The state supreme court's 2005 order denying further consideration of the competency question is unreported. (Pet. App. 176a).

JURISDICTION

The judgment and opinion of the Sixth Circuit were entered on September 11, 2009. (App. 1). The Sixth

Circuit denied rehearing on January 12, 2010.[1] (App. 179a) Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2253(c), as amended by AEDPA, provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

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[1] On April 7, 2010, Justice Stevens granted petitioner's application to extend the time to file a petition for writ of certiorari from April 12, 2010, until May 5, 2010. *Bell v. Thompson*, No. 09A931. Justice Stevens subsequently granted petitioner's request to extend the period an additional five days from May 5, 2010, until May 10, 2010. *Id.*

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(2) A certificate of appealability may issue under paragraph (1) only of the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 60, Federal Rules of Civil Procedure, provides in pertinent part:

(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(6) any other reason that justifies relief.

(c)(1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Rule 39, Rules of the Supreme Court of the State of Tennessee provides:

> **Exhaustion of Remedies.** In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code Ann., § 39 13 206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

STATEMENT

Respondent Gregory Thompson was convicted for the first-degree murder of Brenda Blanton Lane in Coffee County, Tennessee, in 1985 and sentenced to death. The Tennessee Supreme Court affirmed his conviction and sentence on direct appeal, *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), and this Court denied certiorari, *Thompson v. Tennessee*, 497 U.S. 1031 (1990). Thompson's conviction and sentence

were upheld by the trial court on post-conviction and were affirmed by the Tennessee Court of Criminal Appeals. *Thompson v. State*, 958 S.W.2d 156 (Tenn. Crim. App. 1997) (app. denied Oct. 20, 1997).

In 1998, Thompson filed a petition for a writ of habeas corpus challenging the legality of his conviction and sentence. *Thompson v. Bell*, No. 4:98-cv-00006 (E.D. Tenn.). The district court granted summary judgment in favor of the Warden and dismissed Thompson's habeas petition on February 17, 2000. The Sixth Circuit affirmed the district court's judgment, *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003), and this Court denied a petition for writ of certiorari, *Thompson v. Bell*, 540 U.S. 1051 (2003) (reh. denied Jan. 20, 2004).

1. State-Court Proceedings on Competency for Execution

On January 21, 2004, the State of Tennessee filed a motion in the Tennessee Supreme Court requesting the setting of an execution date under Tenn. Sup. Ct. R. 12.4(A). Thompson filed a response opposing the State's motion on grounds of mental illness. He also filed a notice raising the issue of present competency to be executed and requesting a competency hearing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 2000).[2] The Tennessee Supreme Court granted the State's

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[2] In *Van Tran*, the Tennessee Supreme Court announced the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting claims of incompetency under *Ford v. Wainwright*, 477 U.S. 399 (1986).

motion by order entered February 12, 2004, and set an execution date of August 19, 2004. In addition, finding that Thompson had sufficiently raised the issue of his present competence to be executed, the court remanded the case to the Coffee County Circuit Court, where Thompson was originally tried and sentenced, for competency proceedings, including an initial determination by the trial court of whether Thompson had made the required threshold showing that his competency to be executed was genuinely in issue such that an evidentiary hearing was warranted. (Pet. App. 176a).

The Tennessee Supreme Court summarized the evidence Thompson presented to the trial court on the competency question as follows:

> Thompson [ ] submitted the reports of three mental health experts who opined that he presently is not competent to be executed. Although all of these reports indicate that Thompson is suffering from mental illness, described as schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it. . . . Significantly, the reports of all three experts either explicitly, or as part of the factual bases underlying their opinions, illustrate that Thompson presently is aware of the fact of his impending execution for the murder of Brenda Lane.

In a report dated January 28, 2004, Dr. John S. Rabun, a psychiatrist, states that, when questioned about the reason for his incarceration, Thompson "readily admitted that he 'killed Brenda Lane.'" Thompson further discussed his trial in Coffee County with Dr. Rabun, stating that he had been convicted of first-degree murder and, during the "second phase," had been sentenced to "death." Dr. Rabun includes in his report four factors that suggest Thompson is competent to be executed:

(1) Mr. Thompson told the examiner that executions in Tennessee are by "lethal injection or the electric chair," suggesting that he understands how the death penalty is carried out;

(2) Mr. Thompson told the examiner that he was convicted in 1985 of killing the victim of the instant matter, suggesting that he understands the reason for his death sentence;

(3) Mr. Thompson told the examiner that he received the death penalty during the "second phase" of his trial, suggesting that he understands the penalty he received; and

(4) Although Mr. Thompson did not know anything about the current appeal process in his case, he said that he knew the State of Tennessee was seeking to execute him.

Dr. Rabun's ultimate opinion of incompetence is based upon Thompson's alleged delusional beliefs about: (1) his personal status and identity; (2) the State's ability to carry out the death sentence; (3) the likelihood that the sentence will actually be carried out; and (4) what will happen to him upon execution. This Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution. . . .

Moreover, Dr. Rabun's report, recounting the substance of an interview with Thompson as recently as January 19, 2004, clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions. The report states as follows:

Committing Offense: Mr. Thompson was questioned about the reason for his incarceration. Mr. Thompson readily admitted that he "killed Brenda Lane." He noted that he and a female friend had an "idea" to go to Tennessee. He was then living in Georgia, estimating that he returned to Georgia in 1984. He told the examiner that he and his female friend drove to Tennessee, and he kidnapped "Brenda Lane" who worked at a "Methodist newspaper." He again reported that he "killed Brenda Lane." In other words, he accepted

responsibility for his actions. At no point in either interview with the examiner did he try and claim he was innocent or allege that another party committed the offense. Subsequently, he discussed his trial in Coffee County, Tennessee. He indicated that he was convicted of "First Degree Murder" and during the "second phase" was sentenced to "death."

In short, Dr. Rabun's report fails to satisfy the threshold showing for a hearing on competency. Indeed, its detailed description of Thompson's awareness of the murder of Brenda Lane, his sentence of death, and his impending execution, undercuts, rather than supports, his claim of incompetence. . . .

The next report is that of Dr. George W. Woods, Jr., a psychiatrist, who evaluated Thompson on February 17, 2004, for three hours. In a report dated February 27, 2004, Dr. Woods diagnoses Thompson as suffering from schizophrenia, undifferentiated type, and opines that Thompson is "currently incompetent to be executed." Dr. Woods reported that Thompson suffers from bizarre delusions and perceptual disorders such as auditory hallucinations and that Thompson believes he cannot die and will stay alive for two years even if he is executed. Thompson also told Dr. Woods that, once it is acknowledged that he is a lieutenant in the Navy, he will receive a trial before a military tribunal and be exonerated. According to Dr. Woods, Thompson also claims that he has a

fortune in gold bullion buried in his hometown in Georgia, denies that he will die from electrocution, and says that he has been electrocuted before and plans to go either to "Gangster's Paradise" or to Hawaii after his death. . . . Although Dr. Woods relates Thompson's delusional beliefs, his report fails to address directly the critical inquiry under Van Tran-whether Thompson is aware of the fact of his impending execution and the reason for it. To the contrary, Dr. Woods's report indicates that Thompson is aware of the fact of his impending execution and the reason for it. For example, the report states:

> Mr. Thompson believes that he can not die, and there will be a two year period in which he will stay alive, even if he were *executed*. He also believes *that he will not be executed* since he was a lieutenant in the navy, and once this information is acknowledged, *his current conviction* will be thrown out and he will receive a military tribunal which will exonerate him. Thompson further relates that the electric chair is his method of choice.
> (Emphasis added.)

Again, Thompson's beliefs about what will occur after his death or dissatisfaction with his conviction and sentence do not raise genuine issues regarding his competency for execution unless those beliefs preclude Thompson from being aware of the fact of his impending execution and the reason for it. Dr. Woods's

report fails to illustrate that Thompson's beliefs pose such an impediment and therefore fails to establish a genuine issue under *Van Tran* regarding Thompson's present competency.

The third report was provided by Dr. Faye E. Sultan, a psychologist, who examined Thompson on January 28, 2004. Dr. Sultan stated that "in a non-medicated state, Mr. Thompson is floridly psychotic" and unaware of his surroundings. Dr. Sultan opined that Thompson is not competent to be executed "in a non-medicated state." Currently, however, as Dr. Sultan acknowledges, Thompson participates in a regular regimen of medications. Dr. Sultan admits that Thompson knows he has been sentenced to death, but she points out that Thompson holds the delusional beliefs that it is impossible for him to be executed or for the execution to occur. Thompson instead talks about leaving prison and returning to Hawaii or to his family.

At best, Dr. Sultan's affidavit establishes that Thompson may become incompetent at some point in the future if he deviates from his current medication regimen, an allegation that has been rejected by this Court on more than one occasion as insufficient to trigger competency proceedings under *Van Tran*. . . . Thus, like the reports of Dr. Rabun and Dr. Woods, Dr. Sultan's report is insufficient to raise a genuine issue regarding Thompson's present competency to be executed. The expert

> reports indicate, rather, that Thompson is aware of the fact of his impending execution and the reason for it.

Thompson, 134 S.W.3d 168, 171 (Tenn. 2004).

On March 8, 2004, the trial court concluded that the expert reports submitted by Thompson demonstrated that "he presently is aware both of the fact that he has been sentenced to death for the murder of Brenda Lane and of the fact of his impending execution" and did not warrant an evidentiary hearing on the issue of competence. *Thompson*, 134 S.W.3d at 171.

2. *Appellate Review by the Tennessee Supreme Court*

On May 12, 2004, the Tennessee Supreme Court affirmed the judgment of the trial court, concluding, following a *de novo* review of Thompson's petition and evidentiary submissions, that he was competent for execution under the standard established in *Van Tran*.

> The reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane. . . . [W]hile Thompson professes unorthodox beliefs about what will happen *after* his execution, those beliefs do not vitiate Thompson's awareness of the fact of his execution and the reason for it. . . . [A] prisoner's delusional or unorthodox beliefs about what may occur upon

> death or the prisoner's irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of incompetency because they do not impede the prisoner's ability to understand the *fact* or the impending execution and the *reason* for it.

Thompson, 134 S.W.3d at 183. The Tennessee Supreme Court then reiterated its February 25, 2004, order that Thompson's execution be carried out on August 19, 2004. *Id.* at 185.

3. Federal Habeas Proceedings on Competency for Execution

On June 14, 2004, Thompson filed a federal habeas petition under 28 U.S.C. § 2254 challenging the state court's competency determination. One week later, on June 21, the district court entered an order granting a "brief stay" of Thompson's execution, to expire immediately upon issuance of an order denying Thompson's petition, but to remain in place upon issuance of an order granting it, and directing Warden Bell to respond to the petition.

In the meantime, however, on June 23, 2004, the Sixth Circuit issued an order amending and reissuing the opinion it had originally filed on January 9, 2003, in Thompson's first habeas corpus case. On the premise that, because the court had not yet issued its mandate in the earlier case, it was free to reconsider its prior opinion, it reversed the district court's 2000 judgment denying habeas relief in that case and

remanded for an evidentiary hearing. *Thompson v. Bell*, 373 F.3d 688, 691 (6th Cir. 2004). This Court granted the Warden's petition for writ of certiorari and reversed, holding that the Court had abused its discretion by withholding the mandate of its original judgment after the denial of certiorari. *Bell v. Thompson*, 545 U.S. 794, 813-14 (2005).

Following this Court's ruling, the Warden filed an answer to the competency-for-execution challenge in the district court on August 19, 2005, arguing that the Tennessee Supreme Court's 2004 disposition of Thompson's competency claim was neither contrary to nor an unreasonable application of clearly established federal law. In reply, Thompson argued that, without an execution date, his competency claim was no longer ripe. On September 16, 2005, the district court lifted the stay of execution to allow the State to file a motion to set an execution date and allow Thompson to raise the issue of his present mental competency in response to the State's motion to set. The district court stayed the habeas proceeding to allow the parties to initiate further state-court proceedings for litigating Thompson's competency for execution, and the Tennessee Supreme Court reset Thompson's execution date for February 7, 2006.

On September 29, 2005, Thompson filed a motion in the Tennessee Supreme Court requesting a stay of execution, citing a "substantial change" in his mental health status since the state court's previous

competency determination.[3] The Tennessee Supreme Court denied Thompson's motion on December 13, 2005, finding that he had failed to show that there had been "a substantial change in his mental health since the previous determination of his competency that raises a substantial question about his present competency to be executed." (Pet. App. 174a).

On December 21, 2005, Thompson filed a motion in the district court requesting reinstatement of the stay of execution to permit consideration of the merits of his petition for writ of habeas corpus. The district court stayed Thompson's execution on January 5, 2006, and allowed him 30 days to submit any supplemental evidentiary materials considered by the state court. On May 4, 2006, the district court dismissed Thompson's petition, concluding that Thompson's state-court proceedings satisfied *Ford's* due process requirements and that the state-court decisions on Thompson's competency-for-execution claim – both the initial competency determination in May 2004 and the December 2005 determination that Thompson had failed to show a substantial change in his mental health since May 2004 – were neither contrary to or an unreasonable application of clearly established federal

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[3] Under *Van Tran*, if a prisoner has previously been found competent for execution, subsequent *Ford* claims are disallowed unless the prisoner "by way of a motion for stay, provides [the Tennessee Supreme Court] with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed." 6 S.W.3d at 272.

law, nor an unreasonable determination of the facts given the evidence before it. Following an exhaustive review of the evidence presented to the Tennessee courts, the district court concluded:

> The evidence before this Court reflects that Thompson suffers from a severe mental illness with psychotic features. In addition, the record indicates that although Thompson is mentally ill and expresses several delusional beliefs, including that his conviction will be reversed and that his gold bars and Grammy Award will mitigate his death sentence, the expert reports reflect that Thompson knows he is sentenced to death for murdering Brenda Lane. In addition, his delusions acknowledge his criminal conviction and impending death sentence. . . .
>
> Thompson's delusions do not consist of a perception that he did not commit the murder or that he did not receive a death sentence for the murder, but rather, his delusions pertain to circumstances he claims will result in him being awarded a new trial and sentencing hearing. Thompson's delusional beliefs do not bear on the question of whether he knows he is sentenced to be executed for committing a murder. Thompson's experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather, that his perception of himself and his perception of the future is at times distorted by a delusional system in which he believes he is a rich song

writer who will receive a new trial because he was previously a lieutenant in the Navy.

For this Court to grant Thompson's application for a writ on this claim, it must find that the conclusions reached by the trial court and the Tennessee Supreme Court as to Thompson's failure to make a threshold showing that a genuine issue exists regarding his present competency to be executed, and the Tennessee Supreme Court's decision that Thompson failed to demonstrate a substantial change in his mental health since the previous determination of his competency, are objectively unreasonable and contrary to United States Supreme Court precedent or an unreasonable determination of the facts. This Court cannot reach such a conclusion.

Accordingly, Thompson is not entitled to habeas relief on his competency-to-be-executed claim. The conclusions by the state courts that Thompson failed to meet the threshold showing required under *Ford* and *Van Tran* to mandate a hearing and that Thompson failed to demonstrate a substantial change in his mental health since the initial determination of his competency, were not contrary to or an unreasonable application of federal law, nor an unreasonable determination of the facts.

(Pet. App. 105a-107a).

Thompson appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit.

4. Rule 60(b) Proceedings in Thompson's First Habeas Proceeding

Among the claims summarily dismissed by the district court in its disposition in 2000 of Thompson's original habeas proceeding were four sub-parts of an ineffective-assistance-of-counsel claim that were deemed procedurally defaulted due to Thompson's failure to seek discretionary review to the Tennessee Supreme Court during his state post conviction appeal. When Thompson appealed the district court's dismissal, however, he did not directly challenge the district court's default determination as to those claims. And, in January 2003, the Sixth Circuit affirmed the district court's judgment. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003). This Court denied Thompson's petition on December 1, 2003, and denied rehearing on January 20, 2004.[4] *Thompson v. Bell*, 540 U.S. 1051 (2003), *reh. denied*, 540 U.S. 1158 (2004).

On January 20, 2006, Thompson filed a motion in the district court requesting relief from the habeas judgment under Fed. R. Civ. P. 60(b), asserting that

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[4] The Sixth Circuit ultimately issued its mandate in the original habeas corpus proceeding on December 1, 2005, following this Court's determination that it had abused its discretion by withholding issuance following the denial of certiorari. *Bell*, 545 U.S. at 804-06.

extraordinary circumstances warranted relief from that portion of the judgment denying relief due to procedural default. Specifically, Thompson argued that Tennessee Supreme Court's 2001 promulgation of Rule 39 "unambiguously establishes that [the district court] erred in holding Thompson's claims were procedurally defaulted for failure to seek discretionary review."

The district court denied the motion on March 27, 2006. (Pet. App. 158a). Applying the rationale in *Gonzalez*, the district court found, first, that Tenn. Sup. Ct. R. 39 did not qualify as an extraordinary circumstance for purposes of Rule 60(b), since "'it is hardly extraordinary that subsequently, after petitioner's case was no longer pending,' the Tennessee Supreme Court 'arrived at a different interpretation' of what constitutes procedural default." (Pet. App. 165a). The district court further found that, even if Rule 39 did qualify as an extraordinary circumstance, Thompson failed to meet Rule 60's "reasonable time" filing requirement. The district court specifically noted that Thompson waited more than four and one-half years after the enactment of Rule 39 before filing his Rule 60(b) motion. (Pet. App. 167a-168a). Finally, the district court denied a certificate of appealability ("COA") after finding that Thompson failed to make a substantial showing of the denial of a constitutional right. (Pet. App. 172a).

Thompson then applied to the Sixth Circuit for the of issuance of a COA on two issues: (1) whether Thompson presented extraordinary circumstances warranting Rule 60(b) relief; and (2) whether

Thompson's Rule 60(b) motion was filed within a reasonable time. (Pet. App. 183a-184a). On June 19, 2007, the Sixth Circuit granted a limited COA on the issue of "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition." (Pet. App. 65a). However, the court specifically denied Thompson's request to appeal the timeliness question – "We also determine that Thompson's remaining issue does not warrant further review. Consequently, we deny Thompson a COA for that issue." (*Id.*).

5. The Sixth Circuit Reverses Both Habeas Judgments

In an opinion filed September 11, 2009, the Sixth Circuit reversed the judgments of the district court in both habeas proceedings, remanding them for further proceedings. The court concluded that *Ford* established a clear rule that, for purposes of execution, prisoners are incompetent to be executed "if they are unaware of the punishment they are about to suffer and why they are to suffer it." (Pet App. 15a) (citing *Ford*, 477 U.S. at 422 (Powell, J., concurring)). The court further found that this Court had "clarified" *Ford*'s competency-for-execution and "substantial threshold showing" standards in *Panetti v. Quarterman*, 551 U.S. 930 (2007), by imposing, first, a constitutional requirement that a prisoner possess a "rational understanding" of the reason for his execution and, second, a constitutional entitlement to an evidentiary hearing where a prisoner makes a substantial showing of incompetency under that

standard. (Pet. App. 16a-18a). Under its reading of *Ford* and *Panetti*, the Sixth Circuit thus held unreasonable the Tennessee Supreme Court's rejection of Thompson's alleged delusional beliefs as a basis for a finding of incompetency and further held that the evidence before it "at least created a genuine issue about [Thompson's] competency" that "warrants an evidentiary hearing." (Pet. App. 19a-20a).

As to Thompson's Rule 60(b) motion, the Sixth Circuit concluded that the enactment of Tenn. Sup. Ct. R. 39 is an extraordinary circumstance, because "refusing to recognize it 'would disserve the comity interests enshrined in AEDPA by ignoring the state court's view of its own law.'" (Pet. App. 34a) (citing *In re Abdur'Rahman*, 392 F.3d 174, 187 (6th Cir. 2004), *vacated*, 545 U.S. 1151 (2005) (remanded in light of *Gonzalez v. Crosby*, 545 U.S. 524 (2005)). As to the State's finality interests in its criminal judgment, the Sixth Circuit concluded that the State's interests "must be balanced against the more irreversible finality of [Thompson's] execution, as well as the serious concerns about ineffective assistance that caused [the Sixth Circuit panel] so much angst upon its prior consideration of Thompson's petition." (Pet. App. 37a).

The Sixth Circuit remanded both habeas cases to the district court with instructions for the court to consider the merits of Thompson's remaining ineffective assistance of counsel claims and to address the competency question only if it rejects the ineffectiveness claims on the merits. "If the court rejects the ineffective assistance claims, it must then

conduct an evidentiary hearing to determine Thompson's competency for execution." (Pet. App. 37a-38a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision disposes of appeals in two separate habeas cases. Both dispositions adversely impact the interests of the State of Tennessee, and both are fatally flawed and warrant review by this Court. First, in rejecting the Tennessee Supreme Court's 2004 competency determination, the decision below conflicts with *Williams v. Taylor*, 529 U.S. 362 (2000), and fails to accord the state-court decision the proper level of deference under 28 U.S.C. § 2254(d). Next, in holding that the promulgation of Tennessee Supreme Court Rule 39 — a rule that, by its terms, merely clarified the state of Tennessee law since 1967 — constitutes an extraordinary circumstance warranting relief from a judgment in a habeas case under Fed. R. Civ. P. 60(b)(6), the decision conflicts with *Gonzalez v. Crosby*, 545 U.S. 524 (2005), which turned away a similar request based on an outright change in the law. Finally, in rejecting the district court's alternate determination that Thompson's Rule 60(b) motion was untimely notwithstanding its merit, the Sixth Circuit's decision exceeds the scope of the certificate of appealability under 28 U.S.C. § 2253(c), contrary to *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In combination, these errors inflict "profound injury" to Tennessee's "all but paramount" interests in the finality of its criminal judgments, thus presenting important federal

questions worthy of review. *Calderon v. Thompson*, 523 U.S. 538, 556-57 (1998).

This Court has repeatedly stressed the "highly deferential" standard for evaluating state-court decisions under AEDPA. *See, e.g., Renico v. Lett*, __ S.Ct. __, 2010 WL 1740525 (U.S. May 3, 2010); *Berghuis v. Smith*, 130 S.Ct. 1382 (2010); *Smith v. Spisak*, 130 S.Ct. 676 (2010); *Bell v. Cone*, 543 U.S. 447 (2005); *Holland v. Jackson*, 542 U.S. 649 (2004). The damage to Tennessee's interests is particularly great here. This Court recognized five years ago that the Sixth Circuit failed to accord the appropriate level of respect to the finality of Tennessee's criminal judgment when it withheld its mandate for months while the State took steps to carry out Thompson's execution in reliance on the apparent finality of the habeas proceeding. The court now reopens the same case for little more than error-correction that could have occurred on appeal from the district court's 2000 judgment, while at the same time usurping the role of the Tennessee Supreme Court as to its 2004 competency-for-execution determination. Review of both decisions is warranted.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH WILLIAMS V. TAYLOR *AND THE PLAIN LANGUAGE OF 28 U.S.C. § 2254(d)(2), BECAUSE* FORD V. WAINWRIGHT *ESTABLISHED NO SUBSTANTIVE STANDARD NOR PROCEDURAL FRAMEWORK FOR DETERMINING COMPETENCY FOR EXECUTION.*

In rejecting the Tennessee Supreme Court's 2004 competency determination, the Sixth Circuit concluded that the state court unreasonably applied the substantive standard of competence for execution established in *Ford v. Wainwright*, 477 U.S. 399 (1986). But *Ford* established no such standard. To the contrary, this Court has repeatedly stressed that there is no uniform definition of competency for execution under its precedent. *See Panetti v. Quarterman*, 551 U.S. 930, 957, 960-61 (2007) ("The opinions in *Ford*, it must be acknowledged, did not set forth a precise standard for competency.") ("[W]e do not attempt to set down a rule governing all competency determinations."). Where a state court has adjudicated a constitutional claim on the merits, habeas corpus relief may be granted only where the state court's decision was contrary to, or an unreasonable application of, "clearly established Federal law, as determined by the United States Supreme Court." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court made clear that a legal principle is "clearly established" within the meaning of this provision only when it is embodied in a holding of this Court as of the time of the relevant state-court

judgment. *Id.* at 412; *see also Thaler v. Haynes*, 130 S.Ct. 1171, 1173 (2010); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Where, as here, there is no clearly established rule, § 2254(d)(1) may not be invoked to invalidate a state-court merits adjudication.

In *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), the Tennessee Supreme Court established both the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting *Ford* claims. Noting the absence of any articulated standard for competence by the *Ford* majority, the state court observed that a number of other states had adopted the standard in Justice Powell's concurrence, often described as the "cognitive test" for competence, ultimately holding, consistent at that time with the states of Arizona, Georgia, Kentucky, New York, Texas and Wyoming, that, "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Id.* at 262-63, 266. *See Ford*, 477 U.S. at 422 ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.") (Powell, J., concurring). The Tennessee Supreme Court's application of the *Van Tran* standard for competency in Thompson's case is not "contrary to . . . clearly established federal law" under § 2254(d).

Ford itself was a splintered decision in which the majority agreed only that the Eighth Amendment "places a substantive restriction on the State's power

to take the life of an insane prisoner." *Ford*, 477 U.S. at 405. The *Ford* majority did not address the meaning of sanity in this context. Instead, writing for four justices, Justice Marshall stated that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10 (Marshall, J.). Justice Marshall's plurality in *Ford* did not go so far as to state that there should be a uniform standard for insanity, let alone define such a standard. *Panetti*, 551 U.S. at 970 (Thomas, J., dissenting). The Sixth Circuit in Thompson's case thus turned to Justice Powell's concurrence as stating "clearly established" law for purposes of § 2254, reasoning that it was "needed to create a majority," thereby becoming "the controlling opinion" in *Ford*. (Pet. App. 15a) (citing *Panetti*, 551 U.S. at 949). But the *Ford* majority did not address the meaning of insanity, which was one point that led Justice Powell to write separately. *Id.* at 418 ("The Court's opinion does not address [the meaning of insanity in this context]") (Powell, J., concurring). Thus, contrary to the Sixth Circuit's rationale, there was no "controlling opinion" of this Court as to any standard of competency[5] and, thus, no "clearly established" definition for competency against which to judge the Tennessee Supreme Court's competency determination

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[5] The Sixth Circuit's reliance on *Panetti* for this proposition is misplaced. In speaking of Justice Powell's *Ford* concurrence as controlling, the *Panetti* majority was addressing his opinion regarding the threshold showing required to trigger procedural due process protections, not his proposed competency standard. Indeed, even the *Panetti* Court acknowledged that "the *Ford* opinions did not set forth a precise competency standard." *Panetti*, 551 U.S. at 933.

under 28 U.S.C. § 2254(d). *Id.* at 960-61 ("Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations.").

The Sixth Circuit's decision turns on its derivation from *Ford* and *Panetti* of a constitutional requirement that condemned prisoners must possess a rational understanding of their impending execution such that the state court's rejection of Thompson's alleged delusions as a basis for incompetence rendered its decision unreasonable under *Ford* – "[T]he Tennessee Supreme Court unreasonably applied *Ford* when it determined that Thompson's 'severe delusions' are 'irrelevant' to a *Ford* competency analysis." (Pet. App. 19a). The panel misreads both *Ford* and *Panetti*. First, as already shown, because *Ford* established no substantive standard for competency, logic dictates that the Tennessee Supreme Court could not have unreasonably applied it in Thompson's case. Moreover, the Court in *Panetti* specifically rejected the notion that it had established a substantive standard for competency. *Panetti*, 551 U.S. at 960-61. And even if it did, the Court's ruling would still not qualify as "clearly established Federal law" with respect to Tennessee's disposition of the question three years earlier.

Moreover, to the extent the Sixth Circuit opines that Tennessee's refusal to hold formal evidentiary proceedings in Thompson's case constitutes an unreasonable application of *Ford* ("[T]he state courts' dismissal of Thompson's petition without conducting an evidentiary hearing was an unreasonable

application of *Ford*'s tenets." Pet. App. 18a), that ruling also has no basis in any clearly established rule of this Court. As noted in Justice Powell's opinion, "ordinary adversarial procedures . . . are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." *Ford*, 477 U.S. at 426. Indeed, Justice Powell specifically declined to set "the precise limits that due process imposes in this area," *Ford*, 477 U.S. at 427, and most certainly imposed no requirement that states conduct formal evidentiary proceedings.

> [A] constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination. Beyond these basic requirements, the States should have substantial leeway to determine what process best balances the various interests at stake.

Ford, 477 U.S. at 427 (Powell, J., concurring).

Finally, even if *Ford* and *Panetti* could be read collectively as establishing a substantive competency standard for purposes of habeas review under § 2254(d), the Tennessee Supreme Court's decision could not be viewed as unreasonable, because the delusions asserted in Thompson's case do not "prevent[] him from comprehending the reasons for the penalty or its implications," *see Ford*, 477 U.S. at 417, or undermine his fundamental appreciation of the

connection between his crime and punishment. In *Panetti*, the prisoner asserted that he was incompetent to be executed because his delusions prevented him from comprehending the reason for his impending execution. Under his belief system, Panetti viewed himself as part of "spiritual warfare" between good and evil and believed that, although the State "is saying that [it wishes] to execute him for [his] murders," that stated reason was a "sham." *Panetti*, 551 U.S. at 954-55. Panetti's "fixed delusion" thus prevented him from any legitimate awareness of the reason for his execution. The Fifth Circuit affirmed the district court's dismissal of Panetti's habeas petition in a decision consistent with Fifth Circuit precedent under which "a petitioner's delusional beliefs – even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution – do not bear on the question of whether the petitioner 'knows the reason for his execution' for the purposes of the Eighth Amendment." *Id.* at 958. This Court rejected the Fifth Circuit's approach as "too restrictive" to afford a prisoner the protections granted by the Eighth Amendment. While acknowledging that *Ford* did not set forth a precise standard for competency, the Court observed that *Ford* "does not foreclose inquiry" into a prisoner's "rational understanding" of his execution as opposed to simply

his or her awareness of the State's rationale for it.[6] *Id.* at 959.

Here, the Tennessee courts considered evidence of Thompson's delusional beliefs but rejected them as a basis for a finding of incompetency after concluding that those beliefs did not impede Thompson's awareness of the connection between his crime and punishment. Rather, the purported delusions primarily impacted his belief regarding the likelihood that the State would be able to carry out the sentence. In rejecting Thompson's habeas challenge, the district court's opinion highlights this distinction. (Pet. App. 105a–107a). The decision of the Tennessee Supreme Court was reasonable in light of this Court's precedent as of the time of that decision. Review by this Court is warranted.

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[6] It bears noting that, because Panetti's *state court* competency proceedings had already been deemed constitutionally infirm, the district court's analysis in *Panetti* was *de novo*, and not through the deferential lens of § 2254(d)(1), as in this case. This Court's instructions for proceedings on remand in that case thus have limited precedential value for cases subject to review under §2254(d)(1).

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH GONZALEZ V. CROSBY, *BECAUSE THE CLARIFICATION OF TENNESSEE APPELLATE PROCEDURE CODIFIED IN TENN. SUP. CT. R. 39 IS NOT AN EXTRAORDINARY CIRCUMSTANCE SUFFICIENT TO JUSTIFY RELIEF UNDER RULE 60(b).*

Following this Court's 2005 disposition of the Warden's appeal in his initial habeas corpus proceeding, Gregory Thompson returned to the district court requesting Fed. R. Civ. P. 60(b) relief from his habeas judgment which concluded that four subparts of Thompson's ineffective-assistance-of-counsel claim were procedurally defaulted for failure to present them to the Tennessee Supreme Court – based upon the Tennessee Supreme Court's 2001 enactment of a procedural rule, which, by its terms, merely clarified the state of Tennessee law as it has existed since 1967 that criminal defendants need not appeal their post-conviction action to the Tennessee Supreme Court to exhaust their claims. *See Adams v. Holland*, 330 F.3d 398, 405 (6th Cir. 2003). The district court denied Thompson's motion, finding, first, that the state rule in question did not qualify as an extraordinary circumstance for purposes of Rule 60(b) and, second, that Thompson had failed to meet Rule 60's timing requirements in any event. On appeal, the Sixth Circuit rejected both conclusions and reversed. Under Rule 60(b), Thompson was required to demonstrate extraordinary circumstances justifying relief from the district court's 2000 judgment. However, the Tennessee Supreme Court's enactment of Rule 39 does

not constitute such an extraordinary circumstance in this or any other case.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court was careful to point out that "several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA" and that these characteristics "ensur[e] that [the Court's] harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions." 545 U.S. at 534-535. One of these characteristics of Rule 60(b), the Court observed, is the requirement that a movant seeking relief under Rule 60(b)(6) show "extraordinary circumstances" justifying the reopening of a final judgment. *Id.* "Such circumstances will rarely occur in the habeas context." *Id.* 545 U.S. at 535.

In *Gonzalez*, this Court held that a later-arising *change* in the law, particularly one coming after the petitioner had abandoned any attempt to seek review of the judgment denying habeas relief, was not such a circumstance.[7] Here, Thompson sought relief on something much less — a mere *clarification* of pre-existing law. In *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), the Sixth Circuit recognized that Rule 39 "is merely clarifying the state of Tennessee law as it has existed." *Id.* at 405. If it was the rule in 1997,

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[7] Gonzalez moved for relief from the judgment denying his habeas petition under Rule 60(b)(6), citing the Supreme Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), which "showed the error of the District Court's statute-of-limitations ruling." *Gonzalez*, 545 U.S. at 536.

while Thompson pursued his post-conviction appeals, that Tennessee prisoners need not seek discretionary review of their claims in the Tennessee Supreme Court in order to exhaust them, then "[i]t is hardly extraordinary that subsequently," in 2001, the Tennessee Supreme Court promulgated a formal rule to "clarify" the point. *See Gonzalez*, 545 U.S. at 536. Indeed, such a circumstance pales in significance to the intervening legal development at issue in *Gonzalez* and thus most certainly fails to qualify as "extraordinary" so as to justify relief under Rule 60(b).[8] *See also Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).").

While the Sixth Circuit cited *Gonzalez* for the general proposition that "[r]elief under Rule 60(b)(6) . . . requires a showing of 'extraordinary circumstances' . . . and 'must be made within a reasonable time,'" it went on to find an extraordinary circumstance contrary to the holding of that case. (Pet. App. 33a-34a). If an intervening *change* in the law will rarely constitute extraordinary circumstances under Rule 60(b)(6) — and *Gonzalez* drives this point home in the

---

[8] In *Gonzalez*, the petitioner moved for relief from judgment denying his habeas petition under Rule 60(b)(6) on the basis of *Artuz v. Bennett*, 531 U.S. 4 (2000), which "showed the error of the District Court's statute of limitations ruling." *Gonzalez*, 545 U.S. at 536. But the Supreme Court held that the decision in *Artuz*, one that presented a "change in the interpretation of the AEDPA statute of limitations," did not provide the "extraordinary circumstances" required to be shown to justify relief under Rule 60(b)(6). *Id.*

habeas context — then logic dictates that a bid to reopen habeas proceedings on the basis of something *less than* a change in the law cannot possibly succeed. Moreover, Rule 39 "is all the less extraordinary in [Thompson's] case, because of his lack of diligence in pursuing review of the [procedural default] issue." *See Gonzalez*, 545 U.S. at 537. If it was the rule in 1997, while Thompson pursued his post-conviction appeals, that Tennessee prisoners need not seek discretionary review of their claims in the Tennessee Supreme Court in order to exhaust them, then there is *no* excuse for his failure to appeal the district court's 2000 ruling that his claims were procedurally defaulted for failure to exhaust.[9] Instead, as the district court correctly noted, Thompson waited more than four years after the enactment of Rule 39 before filing a Rule 60 motion in the district court. (Pet. App. 167a). "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

The Sixth Circuit passed over its own decision in *Adams* in silence, failing to mention its observation that Rule 39 "works no change to" existing state law. Instead, it concluded that the State of Tennessee's finality interest in this capital case was less weighty when balanced against the "angst" the Sixth Circuit panel had suffered upon its earlier consideration of Thompson's ineffective-assistance-of-counsel claim.

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[9] Rule 60(b)(6) will not provide a second chance for review of an issue "where parties have made deliberate litigation choices." *In re Pacific Far East Lines*, 889 F.2d 242, 250 (9th Cir. 1989) (citing *Klapprott v. United States*, 335 U.S. 601 (1949)).

(Pet. App. 37a). And, rather than applying the holding of *Gonzalez*, the Sixth Circuit based its ruling on a pre-*Gonzalez* decision of the Sixth Circuit that had been vacated by this Court and remanded for further consideration in light of *Gonzalez*:

> Although the Supreme Court subsequently vacated that opinion in *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005) (*Abdur'Rahman II*), the rationale behind our finding in *Abdur'Rahman I* remains valid.

(Pet. App. 33a).[10]

In 2005, however, this Court held that the Sixth Circuit had abused its discretion when it withdrew its initial 2003 opinion before issuance of the mandate and issued an amended opinion vacating the district court's judgment and remanding the case for an evidentiary hearing on petitioner's ineffective-assistance-of-counsel claim. In reaching that

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[10] In *In re Abdur'Rahman*, a 7-6 majority of the Sixth Circuit determined in 2004 that the promulgation of Rule 39 was an extraordinary circumstance sufficient to warrant relief under Rule 60(b)(6). 392 F.3d 174, 186 (6th Cir. 2004). Just five days after deciding *Gonzalez*, however, this Court vacated that decision and remanded for further consideration in light of *Gonzalez*. *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005). Since the Sixth Circuit had already determined, consistent with *Gonzalez*, that petitioner's motion did not constitute a successive habeas application, 392 F.3d at 182, the only possible purpose for the Court's vacatur and remand was for the court to reconsider, in light of *Gonzalez*, its secondary determination that petitioner's motion presented proper grounds for relief under Rule 60(b)(6).

conclusion, the Court gave particular attention to Tennessee's finality interest:

> Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months-based on evidence that supports only an arguable constitutional claim-while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment.

Bell v. Thompson, 545 U.S. 794, 812-13 (2005); *see also Gonzalez*, 545 U.S. at 535 ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved.") (quoting *Liljeberg v. Health Services Aquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)).

The State's finality interests are even stronger now. The Sixth Circuit's mandate on the original habeas action issued in 2005, leaving only the question of whether the Tennessee Supreme Court's determination that Thompson is competent for execution is unreasonable under the standard set forth in 28 U.S.C. § 2254(d), a question presented *supra*. A state's heightened interest in going forward with its criminal processes at this stage was highlighted in Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986):

> [T]he Eighth Amendment claim at issue [competency for execution] can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. *Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime.* That interest is not called into question by petitioner's claim. Rather, the only question raised is not *whether*, but *when*, his execution may take place. *This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all.*

Ford, 477 U.S. at 425 (Powell, J., concurring) (emphasis added).

The Sixth Circuit's decision ignores the import of *Gonzalez* and fails to acknowledge the plain language of Tenn. Sup. Ct. R. 39 that the rule worked no change to Tennessee's legal landscape. The Sixth Circuit's rationale cannot be reconciled with *Gonzalez*, and review by this Court is warranted.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH MILLER-EL V. COCKRELL *AND 28 U.S.C. § 2253(c), BECAUSE THE DECISION EXCEEDS THE SCOPE OF THE CERTIFICATE OF APPEALABILITY.*

The Sixth Circuit's decision also warrants review because it exceeds the scope of the certificate of appealability ("COA") — and thus the Court's

jurisdiction — under 28 U.S.C. § 2253(c). This Court made clear in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), that a COA is a jurisdictional prerequisite in an appeal from a final order in a habeas proceeding under § 2254. "[U]ntil a COA has been issued, federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." 537 U.S. at 336. Moreover, § 2253(c)(3) mandates that the COA "shall indicate which specific issue or issues satisfy the showing required . . . ."

The district court denied Thompson's Rule 60(b) motion on two alternative bases: first, that Tenn. Sup. Ct. R. 39 did not qualify as an extraordinary circumstance for purposes of Rule 60(b)(6) and, second, even if it did so qualify, that Thompson had failed to meet the "reasonable time" filing requirements under Rule 60(c). (Pet. App. 166a). The district court denied a certificate of appealability ("COA") in its entirety after finding that Thompson failed to make a substantial showing of the denial of a constitutional right. (Pet. App. 172a). Thompson then applied to the Sixth Circuit for issuance of a COA on two issues: (1) whether Thompson presented extraordinary circumstances warranting Rule 60(b) relief; and (2) whether Thompson's Rule 60(b) motion was filed within a reasonable time. (Pet. App. 183a-184a). On June 19, 2007, the Sixth Circuit granted a limited COA as follows:

> We conclude that the following issue merits further review by this court, and we grant a COA for the issue: whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R.

> 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition.
>
> *We also determine that Thompson's remaining issue does not warrant further review. Consequently, we deny Thompson a COA for that issue.*

(App. 65a) (emphasis added).

Despite expressly denying a COA as to the timeliness of Thompson's Rule 60 motion, the Sixth Circuit addressed the issue anyway, concluding, contrary to the district court, that the reasons for Thompson's delay in bringing his Rule 60(b) motion were "understandable"[11] (Pet. App. 35a). But, as the district court's order makes clear, the timeliness of Thompson's Rule 60(b) motion was unrelated to its merits and stands as an independent basis for denial of the motion. The Sixth Circuit lacked jurisdiction to review the district court's denial of Thompson's Rule 60 motion as untimely and, thus, had no alternative but to affirm the judgment of the district court. Review is thus warranted.

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[11] In dissent, Judge Suhrheinrich disputed this conclusion of the panel majority, asserting that, "Thompson had many reasonable opportunities and sufficient notice to bring his Rule 60(b) motion well before this eventual January 20, 2006 filing." (Pet. App. 55a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR
FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-5744/5770

[Filed September 11, 2009]
Corrected September 15, 2009

GREGORY THOMPSON, *Petitioner Appellant*,	)
v.	)
RICKY BELL, Warden, *Respondent Appellee*.	)

Appeal from the United States District Court
for the Eastern District of Tennessee of
Chattanooga and Winchester.
Nos. 04-00177; 98-00006—R. Allan Edgar,
District Judge.

Argued: October 30, 2008

Decided and Filed: September 11, 2009

Before: SUHRHEINRICH, MOORE and CLAY, Circuit Judges.

COUNSEL

ARGUED: Dana Hansen Chavis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Jennifer Lynn Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Dana Hansen Chavis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Jennifer Lynn Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

CLAY, J., delivered the opinion of the court, in which MOORE, J., joined. SUHRHEINRICH, J. (pp. 27-41), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Petitioner Gregory Thompson ("Thompson") appeals the district court's dismissal of his habeas petition brought pursuant to 28 U.S.C. § 2254, in which he seeks relief from execution because of his alleged incompetency. Separately, Thompson appeals the district court's denial of his motion pursuant to Federal Rule of Civil Procedure 60(b), in which he moves to re-open his original habeas petition challenging his conviction and sentence. For the

reasons that follow, we **AFFIRM in part** and **REVERSE in part,** and **REMAND** to the district court for further proceedings.

BACKGROUND

In 1985, a Coffee County Circuit Court jury in Tennessee found Thompson guilty of the first-degree murder of Brenda Lane, and following the sentencing phase of the trial, sentenced Thompson to death. *See State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989). The Tennessee courts affirmed Thompson's conviction on direct and collateral review. In 1998, Thompson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the district court denied the petition on February 17, 2000. On January 9, 2003, this Court affirmed the district court's dismissal of Thompson's petition. *Thompson v. Bell*, 315 F.3d 566, 571 (6th Cir. 2003). On December 1, 2003, the United States Supreme Court denied Thompson's certiorari petition, and on January 20, 2004, denied his petition for rehearing. *Bell v. Thompson*, 545 U.S. 794, 800 (2005).

I. Thompson's Incompetency Petition

On January 21, 2004, the day after the Supreme Court denied Thompson's petition for a rehearing, Tennessee's attorney general filed a motion with the Tennessee Supreme Court to set a date for Thompson's execution. On February 2, 2004, Thompson filed a response opposing the state's motion and a petition providing notice of his incompetency to be executed. On February 25, 2004, the Tennessee Supreme Court set an execution date of August 19, 2004, but

remanded the issue of Thompson's competency to the trial court.

Under Tennessee law, set forth in *Van Tran v. State*, 6 S.W.3d 257, 266 (Tenn. 1999), a prisoner is not competent for execution if he "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Under this standard, a prisoner seeking to be found incompetent for execution in Tennessee has the initial evidentiary burden to make a "threshold showing" that his present incompetency is genuinely at issue in order to warrant an evidentiary hearing. *Id.* at 268-69. In his petition to the trial court, Thompson requested an evidentiary hearing to determine his competency, and submitted with his motion his prison medical records, along with the reports of three mental health experts–John S. Rabun ("Dr. Rabun"), George W. Woods, Jr. ("Dr. Woods"), and Dr. Faye E. Sultan ("Dr. Sultan")–who had recently examined him.

The medical records submitted to the trial court show that Thompson has engaged in self-destructive acts from the time his incarceration began, including swallowing poison, cutting his wrist and arms, and burning his hand and face. Prison doctors began prescribing medication, including Lithium, to control Thompson's "mood swings" as early as 1988. (Joint Appendix ("J.A.") at 314.) A medical report from 1988 indicated that Thompson heard "voices" and believed he had gotten a "snake bite" on his finger and chest. (J.A. at 316.) In 1989, prison doctors diagnosed Thompson on two different occasions as "schizophrenic, paranoid type" and as having "bipolar affective disorder." (J.A. at 317, 324.) Thompson was given prescriptions for Klonopin and Trilafon when he

refused to take his Lithium prescription. The psychiatrist who diagnosed him at that time reported that Thompson had been "displaying active evidence of psychosis and mania with marked grandiosity and delusional thought content." (J.A. at 324.) Thompson was continually diagnosed as bipolar or schizophrenic throughout his incarceration. In 1995, a prison doctor deemed Thompson a "mental health emergency" because his mental illness was causing "an immediate threat of serious physical harm to the inmate/patient or to others as a result of [his] violent behavior[.]" (J.A. at 343.) The doctor's report noted that "voluntary . . . medication" had been "ineffective[.]" (*Id.*) According to a physician who evaluated Thompson in 2001, Thompson had been "violent at times" and had "assaulted staff in the recent past which appears to be related to his mental illness." (J.A. at 405.)

Dr. Rabun, a forensic psychiatrist in the pretrial evaluation unit of the St. Louis Psychiatric Rehabilitation Center in Missouri, interviewed Thompson for two and one-half hours on March 17, 2003 and for another two hours on January 19, 2004. Dr. Rabun also read Thompson's medical records and court files, and the reports of other mental health experts who had evaluated him since his incarceration began. Thompson told Dr. Rabun that he has heard voices intermittently since at least the time of his conviction, and that the voices become less acute when he takes antipsychotic medication. Thompson also shared a number of delusions with Dr. Rabun, including that he has written "most of the songs you hear on the radio;" that he has millions of dollars, gold bars and "a Grammy award" buried near a church in Thomaston, Georgia; and that the United States Navy owes him back pay dating back to 1979. (J.A. at 441.)

Thompson told Dr. Rabun that he "killed Brenda Lane," that he had been convicted of first-degree murder, and that he had been sentenced to "death" in connection with the killing. (J.A. at 442, 447.) Thompson also informed Dr. Rabun that because he was "a lieutenant in the Navy" and therefore had a right to be tried by a jury of "professionals," his conviction should be overturned; only the "Secretary of the Navy" could decide to execute him. (J.A. at 442, 448.) Thompson said that "once everyone sees I am a lieutenant, the Secretary of the Navy will take control, and the case will be thrown out." (J.A. at 442.) Thompson elaborated that when his buried fortune and Grammy award are discovered, he will be deemed "rehabilitated." (*Id.*) Thompson told Dr. Rabun that he preferred execution by electrocution, because "I am used to being shocked, every time I touch my TV, I get shocked, or when I went to a chiropractor in 1982, he twisted my neck, and it felt like a shock." (J.A. at 448.)

Dr. Rabun diagnosed Thompson as schizophrenic, hallucinatory and delusional. Having reviewed Thompson's medical records, Dr. Rabun stated that Thompson likely had been suffering from a psychotic illness for more than ten years, and that his illness was particularly severe when he did not take antipsychotic medications. Dr. Rabun ruled out "a physical or neurological disorder" as the cause of Thompson's condition, and rejected the possibility that Thompson had been "malingering." (J.A. at 446.) Dr. Rabun concluded that in his opinion, Thompson "lacks the mental capacity to understand the fact of the impending execution and the reason for it." (J.A. at 449.)

Dr. Woods, a psychiatrist, examined Thompson on February 17, 2004 for approximately three hours, and also reviewed Thompson's medical records, court file and transcripts from his legal proceedings. Dr. Woods reported that "Thompson believes that he can not die, and there will be a two-year period in which he will stay alive, even if he were executed." (J.A. at 463.) Dr. Woods stated that Thompson "denied . . . that electrocution would, in fact, eliminate his life." (*Id.*) In addition to sharing with Dr. Woods the same delusions reported by Dr. Rabun, Thompson also told Dr. Woods that "after death . . . he was going to be in Hawaii." (*Id.*) Dr. Woods diagnosed Thompson as a schizophrenic "suffer[ing] from a severe mental illness with psychotic features." (*Id.*) Dr. Woods noted that Thompson suffers from extreme delusions and hallucinations, even while compliant with his prescribed medication regimen. Like Dr. Rabun, Dr. Woods concluded that Thompson is not competent to be executed.

Dr. Sultan, a clinical psychologist and forensic consultant, submitted a letter dated February 27, 2004, in which she stated that she had conducted eleven clinical interviews of Thompson since 1998, with her most recent interview on January 28, 2004. Dr. Sultan stated her belief that Thompson has been schizophrenic "at least since early adulthood," and reported that Thompson "has experienced the delusions, hallucinations, disorganized thinking, and disorganized speech and behavior that are all characteristic of his particular psychiatric illness." (J.A. at 485.) Dr. Sultan stated that she had observed Thompson off his medication, and concluded that "[i]n a non-medicated state, Mr. Thompson is floridly psychotic." (J.A. at 486.) Without medication, she

stated, Thompson is "unaware of his surroundings," "largely incomprehensible," and "completely unaware about the reason for his incarceration, the sentence he had received, or the fact of impending execution." (*Id.*) Even with medication, Thompson "continues to exhibit the major symptoms of Schizophrenia," "has no real sense of his actual legal situation" and "lacks the understanding that the State of Tennessee could legally execute him." (J.A. at 486-87.) Dr. Sultan cited the same delusions that the other medical experts noted, including Thompson's claims of buried fortune in Georgia, his military rank and his pending re-trial by a "professional" jury. (*Id.*) Sultan concluded that Thompson "currently lacks the capacity to understand the fact of his scheduled execution or the reason for it." (J.A. at 487.)

In addition to his medical records and the reports and affidavits from the three experts, Thompson also presented the trial court with evidence that in 2001 the state had petitioned a Tennessee court for the appointment of a conservator to make decisions on Thompson's behalf regarding his mental health and medical treatment. The conservatorship petition cited Thompson's "long history of [b]ipolar [d]isorder and psychic symptoms," as well as Thompson's failure to comply with his medication prescriptions. (J.A. at 414.) In October 2003, a state court terminated the conservatorship after finding that Thompson was voluntarily taking his medication.

On March 8, 2004, the trial court denied Thompson's incompetency petition without holding an evidentiary hearing, finding that Thompson had not made the requisite threshold showing of incompetency to warrant such a hearing. The trial court found that

"all three of the expert reports . . . demonstrate clearly that Thompson is presently aware that he is under a death sentence for the murder of Brenda Lane under the 'cognitive' standard established by the Supreme Court." (J.A. at 561.)

The Tennessee Supreme Court affirmed the trial court on May 12, 2004. The court found that although the expert reports indicated that Thompson is currently suffering from "schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it." *Thompson v. State*, 134 S.W.3d 168, 179 (Tenn. 2004). The court dismissed Thompson's documented history of mental illness as "stale" and "not relevant to the issue of *present* competency." *Id.* at 178. The court cited Thompson's ability to recount certain details of his crime, and his statements showing that he knows about his death sentence for the murder, as evidence that he is aware of his execution and the reason for it. *Id.* at 180-81. The court also cited Thompson's assertion to Dr. Woods that he will live for two years after his "execution," and his statement to Dr. Sultan that it is impossible for him to be executed, as further evidence that Thompson understands that an execution is going to take place. *Id.* at 182. The court acknowledged Thompson's delusions, but stated that "[t]his Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution." *Id.* at 180.

On June 14, 2004, Thompson filed a federal habeas petition challenging the state court's competency ruling, and on June 21, 2004, the district court stayed Thompson's execution pending the outcome of the

habeas petition. However, Thompson's habeas proceeding concerning his incompetency was stayed when, on June 23, 2004, this Court amended and reversed its January 9, 2003 ruling affirming the denial of Thompson's original habeas petition. The state appealed this Court's amended decision, and on June 27, 2005, the Supreme Court held that this Court had abused its discretion by withholding the mandate of its original judgment for more than five months after the Supreme Court denied rehearing on Thompson's petition for writ of certiorari. *Bell v. Thompson*, 545 U.S. 794, 813-14 (2005).

Following the Supreme Court's denial of rehearing on August 22, 2005, the district court resumed Thompson's habeas petition based upon incompetency, which, by that time, had been stayed for more than one year. Thompson argued that because so much time had passed, he should have the opportunity to update the state courts on his present condition. On September 16, 2005, the district court lifted the stay of execution so Tennessee could set a date for Thompson's execution and Thompson could re-petition the Tennessee Supreme Court. The Tennessee Supreme Court set an execution date of February 7, 2006, and on September 23, 2005, Thompson submitted to that court a petition, authorized under the procedure set forth in *Van Tran*, 6 S.W.3d at 272, showing that a substantial change in his condition had occurred since the court's previous ruling (Thompson's "substantial change petition").

Thompson argued in his substantial change petition that since he filed his first incompetency petition, Thompson's delusions had expanded, and his medications no longer worked. Thompson included

with his petition two affidavits from Dr. Sultan based on her evaluations of Thompson on July 28, 2005 and November 7, 2005. In the first evaluation, Dr. Sultan found that Thompson's "psychological condition had deteriorated" and that it included "a new set of irrational beliefs." (J.A. at 1249.) Dr. Sultan reported that Thompson believed his execution and involvement in Brenda Lane's murder were all "predestined," and that all of the events of his life were written on a note that is "buried at the church" and will prevent him from being executed when it is discovered. (*Id.*) Dr. Sultan concluded that Thompson "can speak about the subject of death on a purely theoretical level but cannot rationally talk about his own death." (*Id.*) Dr. Sultan's second evaluation confirmed that Thompson was continuing to deteriorate. Thompson's substantial change petition also included a new claim that if Thompson is rendered competent for execution only because of the medication he takes involuntarily, then the execution is barred by the Eighth Amendment. On December 13, 2005, the Tennessee Supreme Court denied Thompson's petition, finding that no substantial change had occurred. The court did not address Thompson's additional Eighth Amendment claim.

Thompson then resumed his habeas petition based upon incompetency in the district court. On March 17, 2006, Thompson amended the petition to add the Eighth Amendment claim that he had just presented to the Tennessee Supreme Court with his substantial change petition. On May 4, 2006, the district court dismissed Thompson's petition, finding that the state courts' decisions on Thompson's present competency for execution were neither contrary to nor an unreasonable application of clearly established federal

law, nor an unreasonable determination of the facts before them. With respect to Thompson's claim that it is unconstitutional to execute a prisoner rendered competent through medication, the district court determined that the claim was both in procedural default and time-barred, and that Thompson had failed to state a claim in any event. The district court issued a certificate of appealability with respect to Thompson's original claim of incompetency. Thompson timely appealed. On June 20, 2007, this Court expanded the certificate of appealability to include Thompson's second incompetency claim as well.

II. Thompson's Rule 60(b) Motion

In his original § 2254 petition brought in 2000 to challenge his conviction and death sentence, Thompson raised twenty-two ineffective assistance of counsel claims. Four of those claims were that his trial counsel (1) did not confront and cross-examine a psychiatric expert testifying for the government, (2) did not object to the prosecutor's improper references to Thompson's failure to testify or present a defense, (3) did not inform the court about the prosecutor's racist remark in the presence of the jury, and (4) failed to present mitigating evidence during the sentencing phase to show he would not be disruptive in prison. On collateral review, Thompson had appealed these four claims to Tennessee's court of criminal appeals, but had not sought discretionary review of these claims with the Tennessee Supreme Court.

When the district court dismissed Thompson's first habeas petition on February 17, 2000, it dismissed these four ineffective assistance claims for procedural default because of Thompson's failure to seek

discretionary review of the claims. The district court therefore did not reach the merits of these claims. When Thompson appealed the district court's dismissal of his petition, he did not specifically challenge the district court's procedural default ruling with respect to these four ineffective assistance claims. On June 28, 2001, while Thompson's appeal of the dismissal of his other claims was pending before this Court, the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 39 ("TSCR 39"), which clarified that litigants need not appeal criminal convictions or post-conviction relief actions to the Tennessee Supreme Court to exhaust their appeals. Thompson did not seek an expansion of this Court's certificate of appealability after TSCR 39 was issued. As already noted, this Court initially affirmed the district court's dismissal of Thompson's original habeas petition in January 2003. *Thompson*, 315 F.3d at 571. Following this Court's attempt to amend its ruling and the Supreme Court's subsequent reversal, this Court issued its mandate to the district court to dismiss the petition on December 1, 2005.

On January 20, 2006, Thompson filed a motion pursuant to Fed. R. Civ. P. 60(b)(6) in the district court, alleging that the promulgation of TSCR 39 was an extraordinary circumstance warranting the re-opening of his original habeas petition. On March 27, 2006, the district court denied the motion, and denied a certificate of appealability. Thompson timely appealed, and this Court granted a certificate of appealability on June 19, 2007.

Thompson's appeals of the district court's dismissal of his petition based upon his incompetency and its

denial of his Rule 60(b) motion have been consolidated before this Court.

DISCUSSION

I. Thompson's Incompetency for Execution

A. Standard of Review

This Court reviews a district court's dismissal of a petition brought pursuant to 28 U.S.C. § 2254 *de novo*, but reviews the district court's factual findings for clear error. *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005).

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), a federal court may not grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits unless (1) the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or (2) the state court's decision "was based on an unreasonable application of the facts in light of the evidence presented in the State court proceedings." § 2254(d)(2). A state court's decision is "contrary to" clearly established federal law under § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). An "unreasonable application" occurs when "the state court identifies the correct governing legal principle from [the Supreme]

Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal habeas court may not find a state court decision unreasonable "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the state court decision must be an "objectively unreasonable" application of federal law to be reversed. *Id.* at 409. A habeas court must presume the state court's factual findings are correct. 28 U.S.C. § 2254(e)(1).

B. Analysis

"[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). The Supreme Court derived this principle from reasons found in the "common law" that presently "have no less logical, moral, and practical force than they did when first voiced." *Id.* at 409. In *Ford*, Justice Powell stated in a concurrence to the four-justice plurality opinion that prisoners are insane for the purposes of execution if they are "unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422. Powell also opined that a state may, consistent with due process, presume a prisoner who was competent to stand trial is sane at the time of execution, and "may require a substantial threshold showing of insanity merely to trigger the hearing process." *Id.* at 426. Powell's concurrence, needed to create a majority, became the controlling opinion in *Ford* and "constitutes 'clearly established' law for purposes of § 2554." *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007).

The *Panetti* Court clarified *Ford*'s competency-for-execution and "substantial threshold showing" standards. 551 U.S. at 948-62. In *Panetti*, the state court had denied the petitioner an evidentiary hearing despite his incompetency petition including "a letter and a declaration from . . . a psychologist and a law professor[] who had interviewed petitioner while on death row," *id.* at 938, as well as "references to the extensive evidence of mental dysfunction considered in earlier legal proceedings," *id.* at 950. On habeas review, the district court found that the petitioner's motion had been sufficient to meet the "substantial threshold showing" requirement, and the court therefore held an evidentiary hearing. At the hearing, four experts testified that the petitioner had a "schizo-affective disorder . . . resulting in a genuine delusion . . . [that] recast petitioner's execution as part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light." *Id.* at 954 (quotations omitted). According to the petitioner's experts, the petitioner understood that the state wanted to execute him for the murders he committed, but "believe[d] in earnest that the stated reason is a 'sham' and the State in truth want[ed] to execute him 'to stop him from preaching.'" *Id.* at 955. The district court denied the petitioner's incompetency claim because "the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution." *Id.* at 941-42. The Court of Appeals affirmed.

The Supreme Court in *Panetti* first confirmed that the petitioner had made the substantial threshold showing when he filed his motion with the state court, and under *Ford* was therefore constitutionally entitled

to an evidentiary hearing. *Id.* at 950. The Court cited both the expert reports and the petitioner's documented history of mental illness in reaching this conclusion. *Id.* However, with respect to the competency standard applied by the lower courts, the Supreme Court stated that "the Court of Appeals' standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 956-57. The Court elaborated:

> The Court of Appeals' standard treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution. Yet the *Ford* opinions nowhere indicate that delusions are irrelevant to "comprehen[sion]" or "aware[ness]" if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. If anything, the *Ford* majority suggests the opposite. . . .
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> . . . The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate. We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his

> execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.
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> . . . It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.

Id. at 958, 959, 960 (internal citations omitted).

In Thompson's case, the Tennessee Supreme Court properly identified the standard by which to determine competency when it stated *Ford*'s rule that a prisoner must be able to understand the impending execution and the reason for it.[1] *Thompson*, 134 S.W.3d at 176. Accordingly, Thompson's petition may only be granted if the state courts unreasonably applied that standard to the facts of Thompson's case. *See Williams*, 529 U.S. at 411. As *Panetti* makes clear, the state courts' dismissal of Thompson's petition without conducting an evidentiary hearing was an unreasonable application of *Ford*'s tenets.

[1] In *Coe v. Bell*, 209 F.3d 815, 824-26 (6th Cir. 2000), this Court held that Tennessee's standard and procedures for determining incompetency for execution follow the dictates of Powell's concurrence and are therefore constitutional.

First, the Tennessee Supreme Court unreasonably applied *Ford* when it determined that Thompson's "severe delusions" are "irrelevant" to a *Ford* competency analysis. *See Panetti*, 551 U.S. at 960 ("It is therefore error to derive from *Ford* . . . a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted."). Thompson's delusions relate to precisely the two concepts that Justice Powell required a prisoner to understand to be competent: his impending execution and the reason for it. *See Ford*, 477 U.S. at 422. With respect to Thompson's understanding of his execution, he believes that only the secretary of the Navy can execute him; that electrocution will not "eliminate his life," but that he will live for at least two more years after being electrocuted; and that he will be re-tried for the crime once a "professional" jury is constituted. With respect to Thompson's understanding of the reason for his execution, although he seems to know on some level that it is for "kill[ing] Brenda Lane," his understanding of the connection between his act of murder and the execution appears to be cursory at best, since he seems to believe that when his buried riches are discovered, he will be exonerated.

Second, the Tennessee Supreme Court's determination that Thompson's documented history of mental illness is equally "irrelevant" to the question of his present incompetency was also unreasonable. *See Panetti*, 551 U.S. at 950 (citing petitioner's "extensive evidence of mental dysfunction considered in earlier legal proceedings" as part of the basis for his threshold showing). Although the court was correct that only Thompson's present competency was at issue, his

medical records are relevant to that question, particularly to the extent that they demonstrate a chronic mental condition, or a condition that has only worsened over time. Thompson's medical history demonstrates his "long history of bipolar disorder and psychic symptoms," and that he has been psychotic and delusional since at least 1989. While this history is not definitive proof of Thompson's current incompetency for execution, it is at least probative of the seriousness of his illness and whether it is chronic.

Regardless of whether Thompson's incompetency petition should be granted, his evidence has at least created a genuine issue about his competency, and therefore warrants an evidentiary hearing. Thompson included extensive evidence of his incompetency in his petition, including (1) the reports of three medical experts, two of whom had recently examined Thompson on multiple occasions; (2) a long documented history of delusions and psychosis; and (3) the state's previous effort to appoint a conservator to make medical decisions on his behalf—essentially an acknowledgment by the state that Thompson was mentally ill. The conservatorship was terminated less than five months prior to Thompson's competency petition filing, and only because a court found Thompson had become voluntarily compliant with his drug program. The evidence Thompson submitted was undoubtedly a "substantial threshold showing," and therefore an evidentiary hearing should have been held.

Because the Tennessee courts unreasonably applied federal law clearly established by *Ford*, this Court does not afford AEDPA deference to their dismissal of Thompson's petition. "When a state court's

adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U.S. at 953. Accordingly, this Court will remand the action to the district court to conduct Thompson's incompetency hearing and decide the merits of his incompetency claim *de novo*.

II. Competency Through Involuntary Medication

Thompson alleges that he is "involuntarily" taking antipsychotic medication, and that it is unconstitutional to execute him if he is rendered competent through the forced administration of medication (Thompson's "chemical competency claim"). Thompson alleges that, having been forced to take medication in the past through the conservatorship proceedings, he could be required to take the medication again if he ever stopped voluntarily taking it. Thompson also contends that he has been subjected to physical abuse by prison guards when he has refused medication in the past. Finally, Thompson states that he is currently addicted to the medication, and is now physically incapable of living without medication. The district court dismissed this claim as procedurally defaulted, and found that even if it were not procedurally barred, it would be untimely, and that in any event, Thompson failed to state a claim.

A. Procedural Default

The district court dismissed Thompson's chemical competency claim for procedural default because Thompson "fail[ed] to fairly present his claim to the

state courts before offering it as a federal constitutional violation in a habeas proceeding." *Thompson v. Bell*, No. 04-CV-177, 2006 WL 1195892, at *30 (E.D.Tenn. May 4, 2006). The district court acknowledged that Thompson raised his chemical competency claim with his substantial change petition, but found that the incompetency-for-execution procedures set forth in *Van Tran* prohibited Thompson from raising any other claims along with his claim that his condition had substantially changed. *Id.* (citing *Van Tran*, 6 S.W.3d at 272).

"In determining whether a procedural default has occurred and, if so, what effect the default will have on federal review of a state conviction, the district court must consider whether (1) a state procedural rule exists that applies to the petitioner's claim, (2) the petitioner failed to comply with the rule, (3) the state court actually applied the state rule in rejecting the petitioner's claim, and (4) the state procedural rule is an adequate and independent ground upon which the state can rely to deny relief." *Frazier v. Huffman*, 343 F.3d 780, 790 (6th Cir. 2003). "[A] procedural default does not bar consideration of a federal claim on habeas corpus review unless the last state court rendering a reasoned opinion in the case 'clearly and expressly states that its judgment rests on a state procedural bar.'" *Id.* at 791 (quoting *Harris v. Reed*, 489 U.S. 255, 263 (1989)). However, even if the state court failed to reject a claim on a procedural ground, the petitioner is also in procedural default "by failing to raise a claim in state court, and pursue that claim through the state's 'ordinary appellate review procedures.'" *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 846-7 (1999)); *see also Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004)

("A federal court is also barred from hearing issues that could have been raised in the state courts, but were not[.]"). The corollary to this rule is that where a petitioner raised a claim in the state court but in violation of a state's procedural rule, a state court must expressly reject the claim on that procedural ground for a federal court to deem the claim defaulted. *See Williams*, 460 F.3d at 806 (noting that a state court's expressed rejection of a petitioner's claim on procedural basis and petitioner's complete failure to raise a claim in state court are the two ways a claim can be in procedural default).

Thompson formally raised his chemical competency claim in his substantial change petition to the Tennessee Supreme Court in September 2005; he included the chemical competency claim with that petition. The Tennessee Supreme Court did not address the claim in its December 13, 2005 order denying that a substantial change had occurred.

According to the district court, Thompson violated a state procedural rule, purportedly set forth in *Van Tran*, that a petitioner filing a substantial change petition may not raise any claims for the first time with his substantial change petition. Yet the only statement in *Van Tran* regarding a petitioner's motion for a finding of substantial change is as follows:

> If a prisoner is found to be competent, subsequent *Ford* claims will be disallowed unless the prisoner, by way of a motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination

> of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed.

Van Tran, 6 S.W.3d at 272. Although the district court concluded from this statement that Tennessee forbids a petitioner from bringing any new claims related to his incompetency for execution along with his substantial change petition, nothing in *Van Tran* explicitly states such a rule; in fact, the reference in Van Tran to "subsequent *Ford* claims," in the plural, indicates that *Van Tran* anticipated that other incompetency claims would be brought in addition to a claim of substantial change. Regardless, even if such a limitation existed, the Tennessee Supreme Court, in denying Thompson's petition for a finding of substantial change, did not refer to it. The court rejected Thompson's argument that substantial change in his mental condition had occurred, and did not address or even mention Thompson's chemical competency argument.

The district court, in finding procedural default, cited *Castille v. Peoples*, 489 U.S. 346, 351 (1989), for the proposition that a claim is not fairly presented to a state court where the claim is presented "in a procedurally inappropriate manner which renders consideration on its merits unlikely." *Thompson v. Bell*, No. 04-CV-177, 2006 WL 1195892, at *30 (E.D. Tenn. May 4, 2006). However, the district court misinterpreted *Castille*, which held only that, where a habeas petitioner had the opportunity to raise a claim in the state courts on direct appeal but only raised it for the first time on discretionary review, such a claim is not fairly presented. 489 U.S. at 351; *see also Clinkscale v. Carter*, 375 F.3d 430, 440 (6th Cir. 2004)

(finding that *Castille*'s holding did not require a finding of procedural default because, "[u]nlike the petitioner in *Castille*, Clinkscale raised his [constitutional] claim on direct appeal, *in which there were no special limitations on the ability of the [state court] to reach the merits of that claim*") (emphasis added). Certainly, every time a claim is presented to a state court in violation of its own procedural rule, it is "unlikely" that the state court would consider its merits, but we nevertheless require a state court to expressly deny such a claim based on the procedural rule in order for the claim to be in procedural default. *See Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("The mere existence of a basis for a state procedural bar does not deprive [federal courts] of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case."). In Thompson's case–where it is unclear that there even was a state rule that barred him from raising his chemical competency claim–an express statement from the state court is even more necessary.

Because Thompson indisputably presented his chemical competency petition to the Tennessee Supreme Court in his substantial change petition, this is not a case where we can find procedural default in spite of that court's failure to reject the claim on a procedural ground. *See Williams*, 460 F.3d at 806. Because the state court did not "clearly and expressly state[] that its judgment rests on a state procedural bar," the rules of procedural default did not bar the district court from considering the claim. *See Frazier*, 343 F.3d at 790. Thus, Thompson's chemical competency claim is not procedurally barred.

B. Statute of Limitations

Respondent argues, and the district court found, that even if Thompson did not procedurally default on his chemical competency claim, his claim is still time-barred. With exceptions not relevant here, federal habeas petitioners in custody pursuant to a judgment in a state court must file their petitions within one year of the date judgment becomes final on direct review or the time to seek such review expires. 28 U.S.C. § 2244(d)(1)(A). Because Thompson presented his chemical competency claim to the Tennessee Supreme Court on September 23, 2005, in his substantial change petition, the state courts' judgment with respect to the chemical competency claim first became final on December 13, 2005, when the Tennessee Supreme Court denied Thompson's substantial change petition without addressing his chemical competency claim. Thompson amended his federal habeas petition to include his chemical competency claim on March 17, 2006, well before the one-year limitations period expired. Accordingly, Thompson's chemical competency claim is not barred by the statute of limitations.

C. Failure to State a Claim

1. Standard of Review

"If deference to the state court is inapplicable or inappropriate, we 'exercise our independent judgment' and review the claim *de novo*." *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003). "Where the state court has not addressed or resolved claims based on federal law, most courts, including this one, have held that the decision is not an 'adjudication on the merits.' Thus, a

federal habeas court reviews such unaddressed claims *de novo*." *Howard v. Bouchard*, 405 F.3d 459, 467 (6th Cir. 2005). Because the Tennessee state courts did not adjudicate Thompson's chemical competency claim on the merits, there is no state court decision to which this Court can defer pursuant to 18 U.S.C. § 2254(d). Accordingly, this Court reviews the district court's adjudication of Thompson's chemical competency claim *de novo*. In reviewing the district court's determination that Thompson failed to state a claim, this Court accepts Thompson's factual allegations supporting the claim as true. *See Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998).

2. Analysis

Neither the Supreme Court nor the Sixth Circuit has squarely addressed whether the Eighth Amendment's prohibition on cruel and unusual punishment prohibits rendering a prisoner competent for execution through involuntary medication. However, in addressing previous Due Process claims, the Supreme Court has recognized that mentally ill state prisoners have a "significant liberty interest" in avoiding unwanted antipsychotic drugs. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992). Considering whether a state may forcibly medicate a defendant to render him competent to stand trial, the Supreme Court has held that a state may do so only if the treatment is (1) "*medically appropriate*, *i.e.*, in the patient's best medical interest in light of his condition;" (2) "substantially unlikely to have side effects that may undermine the fairness of the trial," and (3) "necessary significantly to further important governmental trial-related interests," given less

intrusive alternatives. *Sell v. United States*, 539 U.S. 166, 179-81 (2003) (emphasis in original). Although the Court in *Sell* found forcible medication permissible in that case because "important governmental interests are at stake" when the state tries to bring a defendant to trial, the Court added: "Special circumstances may lessen the importance of that interest. The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill–and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* at 180. Thus, the *Sell* Court reiterated the importance of a prisoner's interest in avoiding forcible medication, and signaled that it may be unconstitutional to medicate a prisoner already destined for a lengthy confinement just to render the prisoner competent for legal proceedings.

Although the Supreme Court in *Harper*, *Riggins and Sell* addressed due process challenges and not Eighth Amendment claims, the logical inference from these holdings is that subjecting a prisoner to involuntary medication when it is not absolutely necessary or medically appropriate is contrary to the "evolving standards of decency" that underpin the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). Moreover, the main reason why Justice Powell viewed the execution of insane prisoners as "cruel"–that their inability to understand the reason for their punishment robs them of "the opportunity to prepare, mentally and spiritually, for their death," *Ford*, 477 U.S. at

421—applies with equal force to those who have been rendered chemically competent involuntarily. If forced medication reduces a prisoner's delusions and controls his outward behavior, but does not improve his understanding of his impending death or his ability to prepare for it, it is quite possible that the prisoner cannot be executed under the principles of *Ford*.

The concurring opinion, certain that prior Supreme Court precedent has already precluded such a claim, impermissibly ties loose strands of prior precedents together to reach its conclusion. Essentially, our concurring colleague surmises that because the Supreme Court has held that forced medication is not inherently unconstitutional, and that executions are not inherently unconstitutional, the execution of a prisoner rendered competent through medically appropriate forced medication *must* be constitutional. This leap of logic ignores the Supreme Court's repeated recent willingness to deem unconstitutional the execution of prisoners who the state previously had a legitimate right to execute—including those with mental or developmental deficiencies. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of mentally retarded defendants), *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (applying *Atkins* to prohibit execution of prisoners who were under eighteen years of age at the time of their capital crimes). We simply do not share the concurring opinion's certainty that, given the Eighth Amendment's "*evolving* standards of decency," *Trop*, 356 U.S. at 100-01 (emphasis added), a state's right to execute a prisoner constitutionally hinges on

administering pharmaceuticals that give an otherwise incompetent prisoner the appearance of competence.[2]

Regardless, in this case, it is not necessary to resolve these difficult questions, because regardless of whether the Eighth Amendment prohibits the execution of a prisoner rendered competent through the forced administration of medication, the district court did not err in holding that Thompson failed to state a claim. Even accepting all of Thompson's allegations as true, he is not being forcibly medicated right now. Although he may be right that the state would forcibly medicate him if he stopped taking his medication voluntarily, those are not the facts he presents to us. Thompson's argument that his medication is involuntary because he is addicted to the drugs may be accurate from a physiological perspective, but does not amount to an allegation that the state is ordering him to take medication. Because this appeal does not present the case of a prisoner who may only be competent by way of forced medication, this Court will leave the question of whether executing the "chemically competent" constitutes cruel and unusual punishment for another day. The district court's dismissal of Thompson's chemical competency claim is affirmed, without prejudice to Thompson

[2]The concurring opinion mischaracterizes our view as stating that the execution of those rendered chemically competent "likely" violates the Eighth Amendment. Concurring Op. at 28. We do not go so far. Rather, we note only that it is *possible*, under some circumstances, that such an act would amount to a constitutional violation for the reasons discussed.

raising a chemical competency claim in the future should he be forcibly medicated.[3]

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[3] The concurring opinion also argues that Thompson's chemical competency claim is actually an attack on his original conviction and sentence, and therefore should have been barred as a second or successive petition prior to our reaching the merits. As should be obvious, because the state was not forcibly medicating Thompson or even considering doing so at the time of his conviction and sentence, a claim challenging his competence through forced medication would not have been ripe. *See Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (claim unripe for judicial review unless "it arises in a concrete factual context and concerns a dispute that is likely to come to pass"). Remarkably, although our concurring colleague agrees with us that *even now*, Thompson has failed to state a claim because he is not being forcibly medicated, he nevertheless believes that Thompson would somehow have been able to state a claim at his original sentencing, despite not being forcibly medicated at that time. How the concurring opinion can in one breath agree that the necessary factual predicate to Thompson's claim has not occurred, and in another breath argue that Thompson never needed any such factual circumstances to occur because his claim is a purely "legal" one, is beyond comprehension.

As the concurrence at least recognizes, the only appellate court to have addressed a chemical competency claim voted 10-1 that a chemical competency claim arises only when the defendant is subject to a forced medication order and execution is imminent. *See Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (Loken, J., concurring in the judgment but dissenting on that ground). This Court agrees with that holding, and for this reason, the concurring opinion's statement that "Thompson was under a sentence of death and claims to have been involuntarily medicated back in 1995," Concurring Op. at 35, n.4, is irrelevant, since Thompson's execution was not imminent at that time. Moreover, even if Thompson has asserted that he was forcibly medicated in 1995, he does not make such an assertion before this Court on appeal.

III. Thompson's Rule 60(b)(6) Motion

In the appeal of his other claims, Thompson argues that the Tennessee Supreme Court's promulgation of TSCR 39, which clarified that criminal defendants do not need to appeal their post-collateral relief actions to the Tennessee Supreme Court to exhaust their claims, demonstrates that the district court erred when it dismissed four of his ineffective assistance claims as procedurally defaulted. Thompson argues that because the district court erred, it abused its discretion in denying his subsequent motion pursuant to Fed. R. Civ. P. 60(b)(6) to re-open his original habeas petition with respect to those claims. We agree.

A. Standard of Review

This Court reviews the district court's denial of a motion pursuant to Rule 60(b)(6) for abuse of discretion. *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596 (6th Cir. 2006). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Burrell v. Henderson*, 434 F.3d 826, 831 (6th Cir. 2006) (quotation marks and citation omitted). "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

B. Analysis

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." Fed R. Civ.

P. 60(b)(6). "[R]elief under Rule 60(b)(6) . . . requires a showing of 'extraordinary circumstances,'" *Gonzalez*, 545 U.S. at 536, and must "be made within a reasonable time," Fed. R. Civ. P. 60(c)(1). "[T]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund*, 249 F.3d 519, 529 (6th Cir. 2001) (quotation marks and citation omitted).

We recently found in *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc) ("*Abdur'Rahman I*") that the promulgation of TSCR 39 was an extraordinary circumstance. Although the Supreme Court subsequently vacated that opinion in *Bell v. Abdur'Rahman*, 545 U.S. 1151 (2005) (*Abdur'Rahman II*), the rationale behind our finding in *Abdur'Rahman I* remains valid. In *Abdur'Rahman I*, the district court, similarly to the district court in this case, had dismissed the petitioner's habeas claims as procedurally defaulted for failure to seek discretionary review in the Tennessee Supreme Court. *Abdur'Rahman I*, 392 F.3d at 177. In *Abdur'Rahman I*, this Court reversed the district court and held that the promulgation of TSCR 39 was an extraordinary circumstance warranting relief under Rule 60(b)(6), because the new rule indicated that the district court had failed to recognize a state's own procedural rule—thereby undermining the principle of comity on which AEDPA is based. *Id.* at 186. In *Gonzalez v. Crosby*, 545 U.S. 524, 533 (2005), the Supreme Court addressed another habeas petitioner's Rule 60(b)(6)

motion, finding in that case that the petitioner was not entitled to relief. The Court found that a recent Supreme Court decision, which changed the federal courts' interpretation of the statute of limitations in 28 U.S.C. § 2244(d)(2) so as to render timely the petitioner's previously time-barred claims, was not an extraordinary circumstance warranting relief pursuant to Rule 60(b)(6). *Id.* at 536-37. The *Gonzalez* Court noted that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final." *Id.* at 536. The Supreme Court then vacated this Court's holding in *Abdur'Rahman I* so this Court could reconsider the case in light of *Gonzalez*. *Abdur'Rahman II*, 545 U.S. 1151 (2005). This Court remanded the case to the district court, which found that the promulgation of TSCR 39 was still an extraordinary circumstance after *Gonzalez*. *Abdur-Rahman v. Bell*, No. 3:96-0380, 2008 WL 2002572, at *4 (M.D. Tenn. May 7, 2008).

We agree that the enactment of TSCR 39 is an extraordinary circumstance, and that nothing in the Supreme Court's opinion in *Gonzalez* undermined this Court's reasoning in *Abdur'Rahman I*. Unlike the Supreme Court in *Gonzalez*, which found that a change in federal decisional law by itself was not an extraordinary circumstance, this Court in *Abdur'Rahman I* found the enactment of TSCR 39 to be an extraordinary circumstance because refusing to recognize it "would *disserve* the comity interests enshrined in AEDPA by ignoring the state court's view of its own law." 392 F.3d at 187. A federal court's respect for another state's law was not at issue in *Gonzalez*, in which the Rule 60(b) motion was based solely on a change in federal decisional law

interpreting a federal statute. *See also Blue Diamond*, 249 F.3d at 524 ("[A] change in decisional law is *usually* not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief.") (emphasis supplied). Because this Court's reasoning in *Abdur'Rahman I* is still valid after *Gonzalez*, today we reaffirm our previous holding that a motion based upon the promulgation of TSCR 39 is an extraordinary circumstance warranting relief under Rule 60(b)(6).

However, a movant must also file a Rule 60(b)(6) motion "within a reasonable time." Fed. R. Civ. P. 60(c)(1). Although the Federal Rules do not mandate the specific time by which the motion must be filed, a movant's lack of diligence can detract from the extraordinariness of the circumstance. *Gonzalez*, 545 U.S. at 537-38. Whether the timing of the motion is reasonable "ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990).

In this case, although Thompson did not bring his Rule 60(b) motion until January 20, 2006 –more than four years after the promulgation of TSCR 39–the reasons for Thompson's delay are understandable. First, when the Tennessee Supreme Court enacted TSCR 39 in June 2001, it would have been pointless for Thompson to file a Rule 60(b) motion because at that time, Rule 60(b) motions were deemed equivalent

to successive habeas petitions.[4] *See, e.g.*, *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). In *Abdur'Rahman I*, this Court held for the first time that a Rule 60(b) motion which seeks to reopen a final judgment for reasons other than the merits of the petitioner's substantive claim is not the equivalent of a successive habeas petition. 392 F.3d at 182.

Although Thompson theoretically could have filed his Rule 60(b) motion immediately after *Abdur'Rahman I* was published, the appeal of his habeas petition was still pending on that date. This Court did not issue its mandate to the district court to dismiss Thompson's habeas petition until December 1, 2005; prior to that date, the district court would not have had jurisdiction to hear his Rule 60(b) motion. *See Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993) (Generally, "a district court no longer has jurisdiction over an action as soon as a party files a notice of appeal[.]") Because Thompson filed his Rule 60(b) motion less than two months after we issued the mandate in his case, which he had been actively appealing until that time, we cannot find a lack of diligence that would detract from the extraordinary circumstance reflected in the promulgation of TSCR 39.

We recognize that where the judgment the movant seeks to reopen has already become final, courts are often reluctant to find an abuse of discretion in a

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[4] We note that Thompson did inform this Court about the enactment of TSCR 39 by filing a citation of supplemental authority pursuant to Fed. R. App. P. 28(j) on August 1, 2001, prior to oral argument on his appeal of his habeas petition.

district court's denial of the Rule 60(b) motion. *See, e.g., Stokes v. Williams*, 475 F.3d 732, 736-37 (6th Cir. 2007). However, we must also heed the Supreme Court's admonition that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8 (1963). Courts addressing Rule 60(b) motions must consider the equities, and "the incessant command of the court's conscience that justice be done in light of all the facts." *Blue Diamond*, 249 F.3d at 529; *see also Matarese v. Lefevre*, 801 F.2d 98, 106 (2d Cir. 1986) (Rule 60(b) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case. . . . and should be liberally construed when substantial justice will thus be served.") (internal citations and quotations omitted). In this case, the finality of the judgment against Thompson must be balanced against the more irreversible finality of his execution, as well as the serious concerns about ineffective assistance that caused this Court so much angst upon its prior consideration of Thompson's petition. Because Thompson should be heard on the merits of his four remaining ineffective assistance claims, we reverse the district court's denial of Thompson's Rule 60(b) motion.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's denial of Thompson's Rule 60(b) motion and his habeas petition based upon incompetency, and we **REMAND** for further proceedings. On remand, the district court shall first rule on the merits of Thompson's remaining ineffective assistance claims,

and shall only address the incompetency question if it rejects the ineffective assistance claims on their merits. If the court rejects the ineffective assistance claims, it must then conduct an evidentiary hearing to determine Thompson's competency for execution. The district court's dismissal of Thompson's chemical competency claim is **AFFIRMED**.

CONCURRING IN PART, DISSENTING IN PART

SUHRHEINRICH, Circuit Judge, concurring in part and dissenting in part. The Tennessee Supreme Court erred in affirming the Tennessee trial court's decision to reject Thompson's claim that he is incompetent to be executed without holding an evidentiary hearing on his sanity. Thompson's well-documented history of delusions and psychosis–evidenced by, *inter alia*, three medical experts' opinions, prison records spanning almost two decades, and conservatorship proceedings–is relevant in determining whether Thompson is presently aware of his impending execution and the reason for it. *See Ford v. Wainwright*, 477 U.S. 399, 422 (1986). Accordingly, I concur with the majority's conclusion in Section I of the Discussion, *supra*, that Thompson has made a "substantial threshold showing" of insanity sufficient to warrant an evidentiary hearing on Thompson's present competency to be executed. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007); *Ford*, 477 U.S. at 426. A remand to the district court for an evidentiary hearing on Thompson's present competency is required.

I also agree with the majority's conclusion in Section II, *supra*, that Thompson has failed to state a claim that he is presently being involuntarily medicated in violation of the Eighth Amendment (Thompson's "chemical competency claim"). Because the issue of chemical competency is admittedly not properly before us, the majority's discussion on the

issue is improper and dicta. However, as the majority has openly done so, I feel compelled to at least briefly explain why, in Section I *infra*, the view taken by the majority is inconsistent with Supreme Court precedent. Also, I write separately to express, in Section II *infra*, that Thompson's decision to raise his "chemical competency claim" in his substantial change petition to the Tennessee Supreme Court was procedurally inappropriate. I also contend that Thompson's chemical competency claim is actually a collateral attack on his sentence and may not be raised in a second or successive habeas petition.

Finally, as demonstrated in Section III *infra*, the majority clearly erred in holding that Thompson's Rule 60(b) motion fails because he has not brought his motion within a "reasonable time" as required under FED. R. CIV. P. 60(c)(1).

I.

As the majority explains, Thompson formally raised his chemical competency claim for the first time in his substantial change petition to the Tennessee Supreme Court in September 2005. The district court found the claim procedurally defaulted because adding the claim in the substantial change petition was "procedurally inappropriate." *Thompson v. Bell*, No. 04-CV-177, 2006 WL 1195892, at *30 (E.D. Tenn. May 4, 2006). The majority explains that because the Tennessee Supreme Court did not expressly reject the claim based upon a state procedural violation, the claim is not procedurally defaulted. Even if the majority is right, it does not matter because, as the majority expressly holds, Thompson has failed to state a claim that the state is involuntarily medicating him.

Thus, even though the claim is not properly before us, the majority nonetheless proceeds to express its view on the legal issue of whether a state can execute a prisoner rendered competent through involuntary medication. Given the importance of this question, I feel it necessary to point out why the majority's view of this issue–that it is likely "cruel" to execute those who have been rendered chemically competent involuntarily–is inconsistent with Supreme Court precedent.

As the majority correctly notes, there is no Supreme Court decision directly addressing whether the Eighth Amendment forbids a state from involuntarily medicating an insane prisoner to restore his competency for execution. However, *Ford v. Wainwright* and several Supreme Court cases addressing Fourteenth Amendment challenges to involuntary medication make clear that involuntary medication is not inherently unconstitutional and is actually compelled in certain circumstances.

First and foremost, the Supreme Court has deemed the death penalty constitutional. *Gregg v. Georgia*, 428 U.S. 153, 177 (1976); *Furman v. Georgia*, 408 U.S. 238, 241 (1972).[1] In *Ford v. Wainwright*, the Supreme Court

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[1] Indeed, the Supreme Court has recognized that the government has an essential interest in carrying out a lawfully imposed sentence. *See Moran v. Burbine*, 475 U.S. 412, 426 (1986) (recognizing "society's compelling interest in finding, convicting, and punishing those who violate the law"). Further, "'a State retains a significant interest in meting out a sentence of death in a timely fashion.'" *Cooey v. Strickland*, 479 F.3d 412, 419 (6th Cir. 2007) (quoting *Nelson v. Campbell*, 541 U.S. 637, 644 (2004)). That interest "is at its greatest in the narrow class of capital murder

addressed the Eighth Amendment's limitation on a state's power to execute the insane. The Court found the proscription on executing the insane carried over from England and took hold in our common law at the time the Bill of Rights was adopted. *Ford*, 477 U.S. at 405, 407-09. The Court recognized many divergent theories for barring the execution of the insane, including moral, theological, and ethical arguments, but the Court held one thing for certain. "The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." *Ford*, 477 U.S. at 410. In his concurrence, Justice Powell offered a narrower opinion: "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring). Without a majority opinion, Justice Powell's opinion controlled and set the standard for determining competency for execution. *Panetti*, 127 S. Ct. at 2856. While *Ford* limits a state's right to executing the insane, it is an affirmation that the death penalty itself is constitutional.

In *Washington v. Harper*, the Court considered the question of what limit the Due Process Clause places on a state's power to administer antipsychotic drugs to a mentally ill prisoner against his will. Harper was a state prisoner who suffered from schizophrenia. *Harper*, 494 U.S. at 214. When he stopped voluntarily taking antipsychotic medications, the state began

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cases in which aggravating factors justify imposition of the death penalty," *Singleton v. Norris*, 319 F.3d 1018, 1025 (8th Cir. 2003) (en banc), and accordingly must also be keenly weighed against an inmate's interest in avoiding involuntary medication.

medicating him against his will under a state law authorizing involuntary medication "to inmates who are . . . gravely disabled or represent a significant danger to themselves or others." *Id.* at 226. In resolving Harper's due process challenge to the forced medication, the Court explained that a prison inmate possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs. *Id.* at 222. At the same time, the Court cautioned that the outer limits of that liberty interest must be determined within the context of the prisoner's confinement because the state has a counterbalancing interest "in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id.* at 236. Thus, the Court held that, in a prison setting, "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 227. *Harper* thereby affirmed a state's right to impose involuntary medication under certain conditions.

Applying *Harper* in the pretrial context, the Court in *Riggins v. Nevada* considered the state's authority to involuntarily medicate a prisoner to render him competent to stand trial on serious criminal charges. *Riggins v. Nevada*, 504 U.S. 127 (1992). The *Riggins* Court reiterated that an individual has a liberty "interest in avoiding the involuntary administration of antipsychotic drugs," *id.* at 134, and explained that only a state's "essential" or "overriding" interest could overcome it, *id.* at 134, 135. The Court explained that rendering an accused competent to stand trial for murder would be one such interest, and held that

involuntary medication would not violate due process if the state demonstrated that "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins'[s] own safety or the safety of others." *Id.* at 135.[2]

The Supreme Court subsequently applied the framework erected by *Harper* and *Riggins* in *Sell v. United States*, 539 U.S. 166 (2003), where the Court articulated a four-part analysis courts must use in determining whether involuntary medication may be used to render a defendant competent to stand trial. The government must establish, by clear and convincing evidence: (1) the existence of an "*important*" governmental interest; (2) that involuntary medication "will *significantly further*" that important interest; (3) that involuntary medication is "*necessary*" to furthering the important interest; and (4) that the administration of the drugs is "*medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." *Id.* at 180-81.

The *Sell* Court emphasized that the four part analysis applies when a court "is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial*." *Id.* at 181. However, the *Sell* Court also explained that a

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[2] However, because Riggins was involuntarily medicated without "*any* determination of the need for [antipsychotic medication] or *any* findings about reasonable alternatives," the Court found a due process violation in that case. *Riggins*, 504 U.S. at 135, 136.

court need not conduct the four-part analysis "if forced administration is warranted for a different purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." *Id.* (citing *Harper*, 494 U.S. at 225-26). Guided by *Sell*, this Court now applies the four-part *Sell* standard when the involuntary medication is requested to restore competency to a pretrial detainee and the pretrial detainee is *not* a danger to himself or others, but this Court applies the *Harper* standard if he does pose a danger to himself or others. *See, e.g., United States v. Green*, 532 F.3d 538, 545 & n.5 (6th Cir. 2008).

Additionally, states are constitutionally *required* to provide medical care to inmates. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment's Due Process Clause, requires the state to provide adequate medical care to prison inmates). That duty exists as long as the prisoner is confined and is not extinguished or diminished because the inmate may be under sentence of death. *See, e.g., Singleton*, 319 F.3d at 1026 (reasoning that "the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution"). Indeed, in this Circuit, we hold the state accountable for "deliberate indifference"–a violation of the Eighth Amendment–if the state culpably fails to treat an inmate's serious medical need. *See, e.g., Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008); *see also Blackmore v. Kalamazoo County*, 390 F.3d 890, 897 (6th Cir. 2004) (defining a serious medical need as "one

that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention").

In short, as outlined above, the state has the following rights and obligations vis-a-vis prisoners: The state is obligated under the Eighth Amendment and the Due Process Clause to attend to a prisoner's serious medical needs. *Estelle*, 429 U.S. at 103. The state is also not restricted by the Due Process Clause from involuntarily medicating a prisoner if he is a danger to himself or others. *Harper*, 494 U.S. at 223. The state is further permitted under the Constitution to medicate a defendant to render him competent to stand trial. *Sell*, 539 U.S. at 180-81. And the state may carry out the death penalty, *Baze v. Rees*, 128 S. Ct. 1520, 1529 (2008), so long as the prisoner is competent on the eve of his execution, *Ford*, 477 U.S. at 422.

It follows, then, that if all of the predicate acts of carrying out a valid death sentence on a mentally ill inmate are either constitutionally required or permitted, and the death penalty itself is constitutional, the state's imposition of the death penalty to an inmate rendered competent via involuntary medication must also be constitutional. In other words, it is illogical to conclude that while the state has a duty to provide an inmate with medical care and can also render the prisoner competent to stand trial and possibly receive the death penalty, the state is barred from carrying out the death penalty if that medical care successfully reduces the symptoms of a mental illness and, as a result, the inmate regains his competency.

The en banc Eight Circuit is of a similar view. In *Singleton v. Norris*, the en banc court considered analogous issues to those raised by Thompson, namely "the interrelated issues of whether the State may forcibly administer antipsychotic medication to a prisoner whose date of execution has been set and whether the State may execute a prisoner who has been involuntarily medicated under a *Harper* procedure."[3] *Singleton*, 319 F.3d at 1023. Singleton was under a *Harper* order of involuntary medication, which he argued was initially valid while his execution was stayed but which subsequently became unconstitutional once his execution date was set. *Id.* at 1023. The en banc court disagreed, reasoning that the decision to medicate under *Harper* is made based upon the best medical interests of the prisoner, and "must be determined without regard to whether there is a pending date of execution." *Id.* at 1026. Thus, according to the court, "the mandatory medication regime, valid under a pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set." *Id.*

Singleton also claimed that the Eighth Amendment barred his execution because the state was rendering him "artificially competent" especially so that he could be executed. *Id.* The Eighth Circuit rejected that argument too, explaining that "the state was under an obligation to administer antipsychotic medication" and, therefore, any investigation into whether the state had other motives was "unnecessary" and

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[3] Of course, as correctly noted by the majority, Thompson has not presented facts that he is being involuntarily medicated by the state.

"irrelevant." *Id.* at 1027. The court held, then, that "[a] State does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care." *Id.*

Accordingly, based upon the Supreme Court precedent cited above, holding that an involuntarily chemically competent prisoner may not be executed would be problematic because it would tie the hands of state officials who may be involuntarily medicating inmates to satisfy their obligation to provide appropriate medical care and ensure the safety of prison employees and inmates. Those officials would be faced with the Hobson's choice between administering medically appropriate treatments to the mentally ill inmate population under *Harper* and risking the possibility that lawfully imposed sentences may not be carried out. In that instance, it will likely be the inmates in need of medical treatment that suffer.

As the *Singleton* court held, "*Ford* prohibits only the execution of a prisoner who is unaware of the punishment he is about to receive and why he is to receive it." 319 F.3d at 1027. And medications may reduce the symptoms of psychosis enough that a prisoner may be found *Ford*-competent. Medications may further quell the symptoms enough that a prisoner regains "the opportunity to prepare, mentally and spiritually," for his death. *Ford*, 477 U.S. at 421. Accordingly, a state—which is adhering to either the *Harper* standard in involuntarily medicating a dangerous individual, or simply acting on its responsibility to address the medical needs of its inmates—does not violate the Eighth Amendment by

executing a mentally ill inmate who is receiving antipsychotic medications so long as the prisoner meets the *Ford* standard for competency.

II.

For completeness, I would like to note that it was procedurally inappropriate for Thompson to raise his chemical competency claim in his petition to the Tennessee Supreme Court alleging a substantial change in his mental condition. *Ford* claims are designed to determine whether a prisoner is competent to be executed at the time the execution is imminent. *See, e.g., Coe v. Bell*, 209 F.3d 815, 823 (6th Cir. 2000) ("Coe's *Ford* competency claim was not ripe until his execution was imminent . . . ."). As such, *Ford* claims are distinct from the merits. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 631 (9th Cir. 1997) (explaining that "competency to be executed is not an issue of guilt or innocence" subject to AEDPA's restrictions on second or successive habeas petitions), *aff'd*, 523 U.S. 637 (1998). That is, *Ford* claims do not affect the underlying validity of the conviction and sentence, but only determine the prisoner's present competency to be executed. *That is all that Ford claims decide.*

In Tennessee, if a prisoner challenges the state's right to execute him on the grounds that he fails to meet the *Ford* standard for competency, the trial court will make a competency determination, which is automatically reviewed by the Tennessee Supreme Court. *See Van Tran v. State*, 6 S.W.3d 257, 271-72 (Tenn. 2004). If, on automatic review, the Tennessee Supreme Court finds the prisoner competent, then the *Van Tran* court explains that "subsequent *Ford* claims

will be disallowed" except in one narrow situation: the prisoner,

> by way of a motion for stay, provides this Court with an affidavit from a mental health professional showing that there has been a substantial change in the prisoner's mental health since the previous determination of competency was made and the showing is sufficient to raise a substantial question about the prisoner's competency to be executed.

Van Tran, 6 S.W.3d at 272.

In other words, the *Van Tran* court unequivocally states that the sole function of a substantial change petition is to raise a question about the prisoner's present competency for execution after a court has previously found him competent, thereby allowing a prisoner to raise another *Ford* claim. *Id.* It does not authorize a prisoner to bring any other type of claim. Accordingly, it is procedurally inappropriate to add new claims attacking the underlying conviction and sentence, and any new claims would not be "fairly presented" in such a petition. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that a habeas petitioner's raising of a claim for the first time in two motions for allocutor to the Pennsylvania Supreme Court was not "fair presentation" of the claim because the procedural context in which it was raised rendered consideration on its merits unlikely).

To the extent Thompson argues that Tennessee may not execute him if he is involuntarily medicated, he is attacking the merits of his conviction and

sentence, a *legal* argument.[4] As such, Thompson's chemical competency claim is analytically distinct from Thompson's *Ford* claim, which only alleges that he is presently incompetent to be executed, a *fact*-based argument. *See Ford*, 477 U.S. at 422; *Martinez-Villareal*, 118 F.3d at 631; *see also Martinez-Villareal*, 523 U.S. at 643-45& n.* (1998) (considering "abuse of the writ" cases in deciding whether a habeas petitioner's *Ford* claim is second or successive; however, leaving unresolved whether a "*Ford* claim [raised] for the first time in a petition filed after the

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[4] Contrary to the majority's characterization in footnote 3 *supra*, I do not contend that the factual predicate necessary to ripen Thompson's claim has not yet occurred. Nor do I suggest that Thompson's claim would have been ripe "at the time of his conviction and sentence" in 1985. Quite to the contrary, the facts necessary to ripen Thompson's chemical competency claim arose in 1995, the year Thompson claims that the state involuntarily medicated him.

The fact that Thompson failed to state a claim that he is *presently* being involuntarily medicated does nothing to change the fact that Thompson was under a sentence of death and claims to have been involuntarily medicated back in 1995.

I also do not suggest that because Thompson's chemical competency claim presents a question of law, it was ripe even before the state ever medicated him. To be clear, I agree with the dissenting view in *Singleton*, 319 F.3d at 1028, that ripening a chemical competency claim requires only that a death row prisoner is, or is likely to be, under an order of involuntary medication. Unlike a *Ford* claim, the chemical competency claim does not require that an execution date be "imminent." Therefore, the necessary factual predicate had already occurred at the time Thompson presented his initial petition for habeas relief. As such, even though Thompson fails to state a claim that he is *presently* being involuntarily medicated, the chemical competency claim was nonetheless ripe in 1995.

federal courts have already rejected the prisoner's initial habeas application . . . would be a 'second or successive habeas corpus application' within the meaning of AEDPA"). Therefore, Thompson at a minimum should have brought the claim in his initial habeas petition attacking the merits of his conviction and sentence, but he failed to raise the claim in his 1998 habeas petition, which was dismissed on the merits in 2000. *See Thompson v. Bell*, 315 F.3d 566, 584 (6th Cir. 2003).[5]

Because it was not raised in his initial petition, the claim could only be brought by way of a second or successive petition pursuant to 28 U.S.C. § 2244. However, Thompson also failed to seek the permission of this Court before raising the claim to the district court, so it is not reviewable here.[6] *See* 28 U.S.C. §§ 2244(b)(2), (3).

I realize that the Eighth Circuit, in *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (en banc),

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[5] Our discussion here of AEDPA's limitation on second or successive habeas petitions is distinct from the lead opinion's discussion of the applicability of AEDPA's one-year statute of limitations on federal habeas petitions. *See* Section II, B *supra*. The lead opinion's analysis is confined to consideration of whether Thompson's chemical competency claim, as found in his March 17, 2006 amended habeas petition, was raised within one year of the state court's final judgment.

[6] On June 20, 2007, this Court expanded Thompson's Certificate of Appealability ("COA") to address" whether the district court properly dismissed his claim that it is unconstitutional to execute an individual who is rendered competent through forced medication." Our decision to expand Thompson's COA does not waive AEDPA's gatekeeping provisions under 28 U.S.C. § 2244.

held that 28 U.S.C. § 2244(b)'s restrictions on "second or successive" petitions did not apply to a habeas petitioner's *Ford* claim and "*Ford* derived" Eighth Amendment challenge to involuntary medication. In *Singleton*, the petitioner raised a *Ford*-competency claim in his initial and second habeas petitions. *Singleton*, 319 F.3d at 1021-22. Both times, the courts did not reach the *Ford* claim because the petitions were decided on other grounds. *Id.* Finally, in his third habeas petition, the en banc court had to decide whether the petitioner's *Ford* claim–and his *Ford*-derived chemical competency claim–were barred as second or successive habeas petitions. The court, relying in part upon *In re Cain*, 137 F.3d 234 (5th Cir. 1998), a Fifth Circuit case considering an inmate's challenge to loss of good-time credits, held that a claim that "had not arisen" at the time of a previous habeas petition was not second or successive. According to the en banc majority, the petitioner's chemical competency claim did not arise until he was subject to a *Harper* order of involuntary medication *and* the execution date was set. 319 F.3d at 1023. Because the petitioner was not under a *Harper* order until *after* his initial petitions were adjudicated, the claims "had not arisen" at the time of the prior petitions and were, thus, not "second or successive." *Id.*

One judge dissented. Judge Loken would have concluded that Singleton's claim was ripe by the time Singleton had filed his first federal habeas petition: "Whereas a *Ford* competency claim is fact-intensive, whether it is constitutional to execute an inmate who is competent only by reason of medical treatment–*whether voluntarily or involuntarily administered*–is an issue of law that was apparent to Singleton's attorneys no later than the May 1995

competency hearing." *Id.* at 1028 (Loken, J., dissenting in part). In my view, Judge Loken correctly characterizes the chemical competency claim as a question of law distinct from a fact-driven *Ford* claim. And while certain facts are necessary to ripen the claim–namely that the prisoner is, or likely to be, under an order of involuntary medication–the chemical competency claim is not tied to the same facts relevant to a *Ford* petition–namely the imminency of an actual execution date. *Cf. Cooey v. Strickland*, 479 F.3d 412, 418-19 (6th Cir. 2007) (holding that the statute of limitations in a § 1983 challenge to a state's lethal-injection protocol began to run upon conclusion of direct review of death sentence and not when execution date was imminent).

Thus, were the issue properly before us, the proper answer would be that Thompson's chemical competency claim presents a question of law, distinct from his fact-intensive *Ford* claim, and should have been raised in his initial habeas petition in 1998 attacking the merits of his state conviction and sentence. Indeed, Thompson claims that the state forcibly medicated him as early as 1995. *See Thompson*, 2006 WL 1195892, at *32 n.17. Therefore, the factual basis for this claim undeniably existed when he first petitioned the district court for habeas relief in 1998. And it was most certainly available in 2004 when he filed his *Ford* petition. Because the claim was ripe in 1998, it could and should have been raised in Thompson's initial petition or via a separate 28 U.S.C. § 2244 petition. Since it was not, the claim should be dismissed pursuant to § 2244(b)(2).

III.

I agree that the promulgation of Tennessee Supreme Court Rule 39 ("Rule 39") is an "extraordinary circumstance" under this Court's reasoning in *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (en banc) ("*Abdur'Rahman I*"), *vacated*, 545 U.S. 1151 (2005). However, this Court should not have considered Thompson's Rule 60(b)(6) motion seeking relief from the district court's judgment based upon Rule 39 because he has failed to raise this motion within a reasonable time. *See* FED. R. CIV. P. 60(c)(1). The limits of reasonable time "ordinarily depend[] on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *see also Lester v. Zurn Indus., Inc.*, No. 93-3464, 33 F.3d 54, 1994 WL 421750, *1 (6th Cir. Aug. 11, 1994) ("What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties.").

Thompson had many reasonable opportunities and sufficient notice to bring his Rule 60(b)(6) motion well before his eventual January 20, 2006 filing. Rule 39 was promulgated on June 28, 2001, which provided notice to Thompson of the district court's error respecting exhaustion law in Tennessee. At that time, Thompson was actively pursuing an appeal in this Court of the dismissal of his initial § 2254 habeas petition. Indeed, Thompson even felt compelled to file

a notice of supplemental authority referencing Rule 39 to this Court on August 1, 2001. Thus, Thompson was aware of Rule 39 and its potential effect on his interests at least as early as August 1, 2001. For this claim to be timely, Thompson should have been diligently pursuing his 60(b) motion in 2001, just as the petitioner in the *Abdur'Rahman* line of cases did. *See Abdur'Rahman I*, 392 F.3d at 178 (noting that Abdur'Rahman filed a Rule 60(b) motion relying upon Rule 39 on November 1, 2001, challenging the district court's refusal to consider his prosecutorial misconduct claims as procedurally defaulted).

To be sure, in 2001, Thompson's Rule 60(b) motion would have been treated as a second or successive habeas petition based upon Circuit precedent in *McQueen v. Scroggy*, 99 F.3d 1302, 1305 (6th Cir. 1996), *overruled by Abdur'Rahman I*, 392 F.3d 174, which held that Rule 60(b) motions were the "practical equivalent" of successive habeas corpus petitions. However, it must be remembered that the diligence of Thompson's contemporary, Abdur'Rahman (who was also sentenced to death in Tennessee), who filed a Rule 60(b) motion in 2001 despite *McQueen*, was what led to the overturning of *McQueen* and cleared the path for habeas petitioners to file Rule 60(b) motions in this context without threat of defaulting. In fact, we rejected a similar argument in *Cooey v. Strickland*, 479 F.3d at 422. In *Cooey*, we considered a plaintiff's argument that the statute of limitations on a § 1983 claim did not begin to run until a Supreme Court decision, *Nelson v. Campbell*, 541 U.S. 637 (2004), made a § 1983 action a possible remedy, where circuit precedent explicitly precluded a death-row inmate from challenging his method of execution via § 1983. *Cooey*, 479 F.3d at 422. We rejected the argument,

stating that "[s]o long as there remains the possibility of en banc reconsideration and Supreme Court review, circuit law does not completely foreclose all avenues of relief." *Cooey*, 479 F.3d at 422.

After Abdur'Rahman's successful Rule 60(b) challenge, this *en banc* Court, on December 13, 2004, overturned *McQueen*. *See Abdur'Rahman I*, 392 F.3d at 182. At that time, the threat of Thompson's 60(b) motion being treated as a second or successive habeas petition vanished, and he should have–at the latest–filed his motion within a "reasonable" time thereafter. Instead, Thompson waited another 13 months, and the record and briefs provide no explanation for his delay.

The majority opinion acknowledges that Thompson could have filed his Rule 60(b) motion immediately after *Abdur'Rahman I* was published, but dismisses it as "theoretical" because Thompson's appeal was still pending and the district court would not have had jurisidiction. This is no excuse. While it is true that the district court would not have had jurisdiction to hear Thompson's Rule 60(b) motion while Thompson's habeas petition was before this Court, *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993) (noting that a district court did not have jurisdiction to rule on a 60(b) motion once the plaintiffs filed a notice of appeal), this Court has held that the proper procedure for seeking relief from a judgment under Rule 60(b) is to file that Rule 60(b) motion in district court even if an appeal is pending. *See Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002). The district court would then indicate whether it would grant the motion, thus allowing the party to move this Court for a remand of the case. *Id.* Therefore, contrary to the Court's

reasoning, there was no jurisdictional hurdle for Thompson to overcome before filing his Rule 60(b) motion.

Finally, we must remember that this Court reviews the denial of a Rule 60(b) motion only for abuse of discretion and affirms the district court's ruling "unless this court is left with a 'definite and firm conviction that the trial court committed a clear error of judgment.'" *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578-79 (6th Cir. 1998) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)). In other words, "Under the abuse of discretion standard, an appellate court may overturn a lower court's ruling only if it finds that the ruling was arbitrary, unjustifiable, or clearly unreasonable." *Plain Dealer Pub. Co. v. City of Lakewood*, 794 F.2d 1139, 1148 (6th Cir. 1986). The district court applied the appropriate law and conducted a thorough analysis of the record. Though the district court ultimately held that Rule 39 was not an "extraordinary circumstance" entitling Thompson to Rule 60(b)(6) relief, the district court held that denial was also appropriate because Thompson failed to raise his 60(b) motion within a reasonable time as required under Rule 60(b):

> Rule 39 was enacted on June 28, 2001, and the Sixth Circuit initially issued its opinion on or about January 13, 2003, and certiorari was denied on or about December 1, 2003. However, on or about June 28, 2004, the Court of Appeals for the Sixth Circuit vacated its judgment and remanded the case to this Court. The United States Supreme Court reversed the Sixth Circuit's decision on August 29, 2005, and denied Thompson's petition for rehearing on

> September 19, 2005. Nevertheless, Thompson waited more than four and a half years after the enactment of Rule 39 and four months from the denial of certiorari before filing his Rule 60(b)(6) motion on January 20, 2006. Thompson has not provided any explanation for the delay. Thompson's filing of his motion more than one year after the enactment of Rule 39 demonstrates a lack of due diligence. Such a delay, without excuse, will ordinarily result in the denial of a Rule 60(b) motion.

Thompson v. Bell, No. 4:98-CV-00006, at 8 (E.D. Tenn. Mar. 27, 2006).

In reaching its ruling, the district court properly cataloged the procedural posture of the case and implied relevant points where Thompson could have raised the motion. Accordingly, I believe there is no way that an appellate court can fairly deem the district court's ruling as "arbitrary, unjustifiable, or clearly unreasonable." *Plain Dealer*, 794 F.2d at 1148.

In sum, the instrument for attacking the district court's judgment was available as early as June 28, 2001, when Rule 39 was promulgated. Thompson's filing of a "notice" before this Court in August 2001 demonstrates that he knew about this avenue of attacking the judgment. Finding no compelling justification to excuse Thompson's failure to raise his motion within a reasonable time, I would hold that even though the promulgation of Rule 39 is an "extraordinary circumstance," Thompson's delay in filing his Rule 60(b) motion until 2006 is not reasonable, and the district court properly denied relief on Thompson's motion.

IV.

For the foregoing reasons, I concur in the majority's decision to remand the issue of Thompson's present competency to be executed to the district court for an evidentiary hearing. If the state courts find Thompson meets the *Ford* standard for competency, then the state should be allowed to proceed forthwith with Thompson's execution. Further, Thompson's underlying state court judgment and conviction should not be revisited under the guise of a very untimely Rule 60(b) motion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-5744; 06-5770

[Filed September 11, 2009]

GREGORY THOMPSON, Petitioner-Appellant,	)
v.	)
RICKY BELL, Warden, Respondent-Appellee.	)

Before: SUHRHEINRICH, MOORE and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga and Winchester.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5770

[Filed June 19, 2007]

GREGORY THOMPSON,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)
	)
Respondent- Appellee.	)
	)

O R D E R

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

Gregory Thompson, a Tennessee prisoner under sentence of death, appeals from the district court's denial of his motion for relief from judgment under FED. R. CIV. P. 60(b) in this case involving Thompson's original petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The case is now pending

before this court for review of Thompson's Protective Application for a Certificate of Appealability (COA).

In 1985, a Tennessee jury convicted Thompson of first-degree murder, and the trial court adopted the jury's recommendation in sentencing Thompson to death. The Tennessee Supreme Court affirmed Thompson's conviction and sentence on direct appeal. *State v. Thompson*, 768 S.W.2d 239, 253 (Tenn. 1989).

In 1998, Thompson filed his § 2254 petition, and the district court dismissed the petition as meritless. On appeal, this court initially affirmed the district court's decision. *Thompson v. Bell*, 315 F.3d 566, 571 (6th Cir. 2003). However, prior to the issuance of the mandate on appeal, the court reconsidered its earlier opinion and vacated the district court's judgment in light of evidence not considered previously. *Thompson v. Bell*, 373 F.3d 688, 692 (6th Cir. 2004). The Supreme Court subsequently reversed this court's decision, concluding that this court had abused its discretion in delaying the issuance of the mandate until the court released its amended opinion. *Bell v. Thompson*, 545 U.S. 794, 796 (2005).

In January 2006, Thompson filed a motion in the district court, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from the district court's dismissal of his § 2254 petition. The district court denied the motion as without merit and denied him a COA. Thompson now moves this court to grant him a COA. *See United States v. Hardin*, 481 F.3d 924 (6th Cir. 2007) (requiring a COA before a habeas petitioner may appeal the denial of a Rule 60(b) motion).

Under 28 U.S.C. § 2253(c)(2), the court should grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude [that] the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court has emphasized that a petitioner is not required to show that the appeal will succeed to be granted a COA, and the court should not deny a COA merely because it believes that the petitioner fails to demonstrate an entitlement to relief. *Id.* at 337.

We conclude that the following issue merits further review by this court, and we grant a COA for the issue: whether the Tennessee Supreme Court's enactment of TENN. S. CT. R. 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition.

We also determine that Thompson's remaining issue does not warrant further review. Consequently, we deny Thompson a COA for that issue.

The Clerk's Office shall issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

No. 1:04-cv-177
Edgar/Shirley

[Filed May 4, 2006]

GREGORY THOMPSON,	)
	)
Petitioner,	)
	)
v.	)
	)
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)
	)
Respondent.	)

MEMORANDUM OPINION

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v.
Ricky Bell, Warden, Riverbend Maximum Security Institution

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Eastern District of Tennessee at Chattanooga

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MEMORANDUM OPINION

Gregory Thompson ("Thompson" or "petitioner"), a death-sentenced inmate at the Riverbend Maximum Security Institution in Nashville, Tennessee, brings this twice amended petition for writ of habeas corpus against the Warden, Ricky Bell ("State" or "respondent"), pursuant to 28 U.S.C. § 2254 [Court File No.41] challenging his competency to be executed. In *Ford v. Wainwright*, 447 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment prohibits the execution of a prisoner who is insane. Following the concurring opinion of Justice Powell in *Ford*, courts have concluded that "insanity" in this context means that a prisoner is insane only if the prisoner is not aware of his or her impending execution and the reason for it. *Ford*, 477 U.S. at 422; *Coe v. Bell*, 209 F.3d 815, 826 (6th Cir. 2000). On the exercise of its inherent supervisory authority, the Tennessee Supreme Court in *Van Tran v. State*, 6 S.W.3d 257 (1999) adopted Justice Powell's standard for determining insanity, and established a procedure by which a prisoner might challenge his competency to be executed. These procedures, required by due process, were approved by the Sixth Circuit Court of Appeals in *Coe*, 209 F.3d at 825. One part of this procedure is that the prisoner must make a threshold showing that he meets the *Ford* definition of insanity in order to obtain a hearing on the competency petition.

The Tennessee State courts have determined that Thompson failed to make such a showing. Specifically they have held that Thompson has not made a threshold showing that there is a disputed issue regarding his present competency, thus dismissing

Thompson's petition. *Thompson v. State*, 134 S.W.3d 168, 183 (Tenn. 2004). By order entered, December 13, 2005, the Tennessee Supreme Court reaffirmed this conclusion, after considering additional submissions. In this "competency to be executed" petition, Thompson claims that the conclusion reached by the state courts was erroneous.

After carefully reviewing the amended petition [Court File No. 41], the State's responses [Court File No. 14, 44], petitioner's replies [Court File No. 18, 48], and the state court record, this Court finds the conclusions reached by the state court were neither based on an unreasonable determination of the facts, nor contrary to federal law. Petitioner's petition for writ of habeas corpus will be **DISMISSED.**

I.
FACTUAL BACKGROUND

The present petition is limited to issues concerning Thompson's competency to be executed. Thompson was convicted for the fist-degree murder of Brenda Blanton Lane in 1985 and sentenced to death. After Thompson's first-degree murder conviction and death sentence were upheld on direct appeal[1] and state post-conviction relief was denied,[2] Thompson sought federal habeas corpus relief. This Court granted summary judgment for the State, and the United States Court of Appeals for the Sixth Circuit, on

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[1] *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989).

[2] *Thompson v. State*, 958 S.W.2d 156 (Tenn.Crim.App. 1997).

January 9, 2003, affirmed.[3] The United States Supreme Court denied certiorari.[4]

On March 1, 2004, Thompson filed a petition in state court asserting he was incompetent to be executed. The Tennessee Supreme Court remanded the matter to the Coffee County Circuit Court, where Thompson was originally tried and convicted, ordering that the competency issue be determined under the procedures set out in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Thompson filed a petition supported by numerous documents including the reports of three experts asserting he was incompetent to be executed, while also acknowledging that Thompson was aware he was facing the death penalty because he was convicted of murder. The state court determined Thompson failed to meet the "high threshold showing" necessary to require a hearing on his petition. Specifically, the court dismissed Thompson's petition on March 8, 2004, without an evidentiary hearing, concluding that his evidentiary submissions demonstrated he was "aware that he is under a death sentence for the murder of Brenda Lane[.]" The Tennessee Supreme Court affirmed the trial court's denial on May 12, 2004. *Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004).

On June 14, 2004, Thompson filed a petition for a writ of habeas corpus requesting an evidentiary hearing on his competency-to-be-executed claim. Meanwhile, on June 23, 2004, the Sixth Circuit Court

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[3] *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003).

[4] *Thompson v. Bell*, 540 U.S. 1051 (2003).

of Appeals amended and reissued the opinion that it had originally filed on January 9, 2003, in the original habeas petition. The Sixth Circuit vacated this Court's judgment dismissing Thompson's original habeas petition and remanded the case to this Court. The State petitioned the United States Supreme Court for certiorari which was granted. The United States Supreme Court reversed the Sixth Circuit Court of Appeals amended opinion.[5] This effectively ended the litigation on Thompson's original habeas petition. This Court then permitted Thompson to proceed with the instant habeas petition challenging the state court's decision on his competency-to-be-executed claim.

On September 16, 2005, this Court lifted the stay of execution to permit the State to file a motion to set an execution date and allow Thompson to raise the issue of his present mental competency to be executed in his response to the State's motion to set an execution date [Court File No. 19].[6] At the conclusion of the state court proceedings Thompson filed a motion to stay execution [Court File No. 25] which the Court granted on January 5, 2006, permitting Thompson to proceed with the instant habeas petition [Court File No. 28]. Thompson has filed an amended petition [Court File No. 41] replacing all prior "competency to be executed" petitions filed in this case, and the State has filed its response. On February 3, 2006, this Court issued a clarifying order that Thompson's stay of execution is in effect until further order of the Court

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[5] *Bell v. Thompson* 125 S.Ct. 2825 (2005).

[6] The State court had resolved Thompson's previous competency to be-executed claim in May of 2004.

[Court File No. 29]. In addition, Thompson was permitted to engage in limited discovery [Court File No. 40].

Presently before the Court is Thompson's second motion for discovery [Court File No. 45]. Thompson is requesting to depose internal affairs investigators and persons with knowledge of the facts obtained during the investigation of Thompson's mental state, so that he may gain access to evidence relevant to his *Ford* clam. The State maintains petitioner is mistaken because no such investigation ever occurred.

Because Thompson's expert reports reflect that he meets the tests for competency under *Ford Wainwright,* 477 U.S. 399 (1986), and *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999), and because he has failed to show good cause for the requested discovery, Thompson's second motion for discovery will be **DENIED** for failure to demonstrate good cause [Court File No. 45].

II.
STANDARD OF REVIEW

This Court has jurisdiction over the present petition under 28 U.S.C. § 2254. The provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply for purposes of this Court's analysis. Under AEDPA federal courts reviewing a state court decision may only grant a petition for writ of habeas corpus where the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In determining whether the competency-to-be-executed claim is a mixed question of law and fact or strictly a question of fact, the Court is guided by *Coe v. Bell,* 209 F.3d 815 (6th Cir. 2000). In *Coe,* the Sixth Circuit observed that if a competency-to-be-executed claim is a question of fact, the state court determination is entitled to the presumption of correctness, and the petitioner must rebut the presumption by clear and convincing evidence. In addition, the habeas petition must be denied unless the state court decision was based on an unreasonable determination of the facts in light of the evidence at the hearing. *Id.* at 926.

If competency-to-be-executed is a mixed question of law and fact, the Sixth Circuit concluded the presumption of correctness does not apply, and the analysis must be under § 2254(d)(1) – the contrary to, or unreasonable application of, clearly established federal law prong. *Id.* A state court decision will be contrary to the United State Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the "state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 406 (2000). A state court decision will

involve an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule from Supreme Court precedent but applies it unreasonably to the facts of the state case, or if the state court unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Id.* at 407-08. When conducting the "unreasonable application" inquiry, *Williams* directs a federal habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

The United States Supreme Court has acknowledged that "it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact[.]" *Id.* at 408. Without deciding whether competency to be executed is a mixed question of law and fact or a question of fact, the Sixth Circuit applied the standard of review most favorable to the habeas petitioner, *Coe, i.e.,* §2254(d)(1) -- whether the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Following the Sixth Circuit's lead, the Court will apply the standard of review most favorable to Thompson, *i.e.*, § 2254(d)(1) -- whether the state courts' decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

III.
DISCUSSION
THOMPSON'S CLAIMS FOR RELIEF

Thompson claims that his execution will violate the Eighth Amendment because he is incompetent to be executed. Thompson maintains that he is insane and his death sentence should be vacated and a life sentence should be imposed.[7] Although the precise issue before the Court in this habeas proceeding is whether the state court's decision that Thompson failed to meet the threshold requirements for an evidentiary hearing on his competency-to-be-executed claim was unreasonable or contrary to Supreme Court precedent, Thompson has subsumed this issue within sub-claims I, II, and III of his amended petition. The Court will address Thompson's competency-to-be-executed claim and his three sub-claims separately.

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[7] The *Van Tran* court noted that one of the most difficult procedural questions, and the one most in need of legislative response, is what is to be done with a prisoner who is not competent to be executed. However, the court did *not* suggest that an appropriate answer to this difficult procedural question was to vacate the death sentence and impose a life sentence. Rather, the court stated the issue should be clarified by legislation but until and unless a statutory review procedure is adopted, the *Van Tran* court concluded that the order staying the execution shall direct the parties to submit a status report, summarizing the prisoner's mental condition, every six months to the Tennessee Supreme Court. When and if the status report indicates the prisoner has regained competency, the Tennessee Supreme Court will remand the case to the trial court for a hearing to determine whether the prisoner has regained competency so that an execution date may be scheduled. At that hearing, the burden shall be on the State to prove competency by a preponderance of the evidence. *Van Tran v. State*, 6 S.W.3d at 272-73.

A. Competency-To-Be-Executed Claim

First, the Court will consider Thompson's competency-to-be-executed claim. Thompson argues, that the state courts erred by failing to follow the proper legal standard under *Ford v. Wainwright*, 477 U.S. 399 (1986). In the alternative, Thompson argues the state courts' determination that he failed to meet the threshold showing necessary to demonstrate that there is a genuine, disputed issue as to his competency is clearly wrong, contrary to and/or an unreasonable application of, federal law and an unreasonable interpretation of the facts. Finally, Thompson asserts that his severe mental illness and psychotic delusions render him insane, and his execution, would violate the Eighth Amendment [Court File No. 41, at 58-60].

Thompson declares he is insane and that the State, "knowing of his severe mental illness, has been submerging him in an ocean of drugs." [Court File No. 41, at 58]. Thompson asserts that he "is medicated every day, twice a day, with mood stabilizing and anti-psychotic drugs. One day a week he is injected with yet another long acting anti-psychotic drug." [Court File No. 41, at 58]. Thompson contends that his twenty years of medical history demonstrates he remains psychotic and delusional.

Although Thompson maintains the issue before this Court is whether his execution will violate the Eighth Amendment, he claims the state court did not directly address this issue but rather, only determined Thompson failed to make a threshold showing that his competency is genuinely at issue. The State contends that the Tennessee state courts correctly determined, based on Thompson's own evidentiary submissions,

that he is presently aware of both the fact of his impending execution and the reason for it.

1. State Court Proceedings

The trial court decided on March 8, 2004, that Thompson was aware he is under a death sentence for the murder of Brenda Lane, and that Thompson did not reach the high threshold showing necessary to require a hearing on his petition wherein he claimed he was incompetent to be executed. On May 12, 2004, the Supreme Court of Tennessee issued an eighteen page opinion, after conducting a *de novo* review of the trial court's determination that Thompson failed to establish a genuine issue regarding his present competency, affirming the trial court's decision. *Thompson v. State,* 134 S.W.3d 168 (Tenn. 2004). The trial court concluded:

> that all three of the expert reports submitted to the Court by Gregory Thompson demonstrate clearly that Thompson is presently aware that he is under a death sentence for the murder of Brenda Lane under the "cognitive" standard established by the Supreme Court. All that is necessary for competence to be executed is that the prisoner need only to be aware of the fact of his impending execution and the reason for it. *Van Tran,* supra. This Court finds and holds that these requirements have been met and are presently existing.

[Addendum 8, at 2-3], The court concluded Thompson failed to reach the high threshold showing necessary to require a hearing on his petition and, in addition, that he is aware he is under a death sentence for

murdering Brenda Lane. This finding necessarily results in a finding that Thompson is competent to be executed.

In 2005 when Thompson returned to state court so the parties could initiate state court proceedings for litigating Thompson's present competency, the Tennessee Supreme Court denied hearing, finding that Thompson did not show that there had been a substantial change in Thompson's mental health since the previous determination of his competency to be executed in 2004.

2. ***Ford v. Wainwright*, 477 U.S. 399 (1986)**

The Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* decision, where the Supreme Court articulated that the Eighth Amendment prohibits the State from executing a prisoner who is insane, was a fractured opinion where the five-member majority, consisting of a four-member plurality and a separate concurrence by Justice Powell, agreed on three matters. The Supreme Court Justices agreed that: (1) the Eighth Amendment forbids a state from executing an insane person, *id.* at 409-10; (2) Florida's governor violated *Ford's* due process rights when he failed to consider the opinions of *Ford's* psychiatrist, *id.* at 413-16; and (3) Ford was entitled to an evidentiary hearing in federal district court. *Id.* at 418.

Under the Florida procedure, when the governor was informed that a prisoner about to be executed might be insane, the governor appointed three psychiatrists who examined the prisoner at the same

time and made a report to the governor. The governor then determined whether the prisoner had the mental capacity to be executed. *Ford*, 477 U.S. at 412. The Supreme Court found this process entirely devoid of due process because: (1) the prisoner was not permitted to present any material relevant to his sanity to be executed; (2) the prisoner was not permitted to challenge the opinions of the state-appointed psychiatrists or cross-examine the psychiatrists; and (3) the governor was in complete control of the entire decision-making process. Because the Supreme Court concluded that Florida's statue provided inadequate assurances for trustworthiness in its procedure for determining whether a prisoner is competent to be executed, the *Ford* Court determined Ford was entitled to a *de novo* evidentiary hearing in the United States District Court, on the question of his competence to be executed. *Id.* at 418.

In concluding the Florida procedures for determining sanity to be executed were inadequate to preclude federal redetermination of the constitutional issue, the *Ford* Court provided very little guidance on the appropriate procedure for determining competency but did specifically explain:

> We do not here suggest that only a full trial on the issue of sanity will sate to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. *Cf. Pate v. Robinson*, 383 U.S. 375, 387, 86 S.Ct.

> 836, 843, 15 L.Ed.2d 815 (1996) (hearing on competency to stand trial required if "sufficient doubt" of competency exists).

Id. at 416-17.

Although the majority opinion in *Ford* did not address the meaning of sanity in this context, in his concurrence, Justice Powell concludes the Eighth Amendment only forbids the execution of those who are unaware of the punishment they are about to suffer and why they being executed. *Ford*, 477 U.S. at 422. Justice Powell specifically concluded the following standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition: "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422. Furthermore, Justice Powell concluded the state may properly presume the petitioner who was competent throughout his criminal proceeding remains sane and "may require a substantial threshold showing of insanity merely to trigger the hearing process." *Id* at 426. Justice Powell also explained that the question of petitioner's sanity calls for a basically subjective judgment; it depends substantially "on expert analysis in a discipline fraught with 'subtleties and nuances.'" *Id.* Justice Powell further observed that the question of competency for execution is independent of the validity of a prisoner's trial and sentencing, affecting only *when*, not *whether*, an execution may take place. *Id.* at 423.

3. *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999)

The Tennessee legislature never enacted a statutory scheme for the determination of the competency of prisoners to be executed. *See Van Tran*, 6 S.W.3d at 263. In 1999, when the first execution in Tennessee in forty years was approaching, the Tennessee Supreme Court decided *Van Tran*. The *Van Tran* court promulgated a procedure adopting standards resembling Justice Powell's definition in *Ford* of competency to be executed. As Justice Powell stated, and as many state statutes provide, at the hearing to determine whether the prisoner is competent to be executed, the prisoner is presumed to be competent. *Van Tran*, 6 S.W.3d 257. The prisoner must overcome this presumption of competency by a preponderance of the evidence. *Id.* at 270-71. During the hearing, the prisoner has the opportunity to be heard, to present evidence relevant to the issue of competency,[8] and to cross-examine the State's witnesses. *Id.* at 271.

In *Van Tran*, the Tennessee Supreme Court addressed both the standard for determining competency for execution in Tennessee and the procedures afforded state prisoners asserting *Ford* claims. The Tennessee Supreme Court, following Justice Powell's concurrence, adopted a "cognitive test" for competence, holding that, "under Tennessee law a prisoner is not competent to be executed if the prisoner

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[8] The *Van Tran* court noted that the rules of evidence "should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency." *Van Tran v. State*, 6 S.W.3d at 271.

lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Van Tran*, 6 S.W.3d at 266.

It is important to note that in *Ford*, the Supreme Court held a Florida procedure deficient because the procedure afforded prisoners about to be executed no procedural safeguards. Unlike the Florida process, the Tennessee process meets the fundamental requirement of due process which is the opportunity to be heard. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *Coe v. State*, 209 F.3d 815, 825 (6th Cir. 2000) ("In setting forth the procedures for handling a *Ford* claim, the Tennessee Supreme Court properly followed the narrow concurring opinion of Justice Powell in establishing the standard for competency to be executed and by placing the burden of proof on the prisoner to make a threshold showing of incompetence for a hearing.")

The United States Court of Appeals for the Sixth Circuit has held that the procedures identified in *Van Tran* for handling a *Ford* claim, "are generally adequate to protect a prisoner's right to a fair hearing of his *Ford* competency claim as required by due process." *Coe v. Bell*, 209 F.3d 815, 822 (6th Cir.), *cert. denied*, 529 U.S. 1084 (2000). To make a sufficient showing that there is a genuine, disputed issue regarding the prisoner's competency, the evidence must relate to present competency; thus, the evidence from recent mental evaluations or recent observations of the prisoner is necessary. *See Coe*, 17 S.W.3d at 212. In addition, unsupported conclusory assertions will be insufficient to satisfy the required threshold showing. *Id.* In Tennessee, allegations that the prisoner is

mentally ill are insufficient to meet the threshold showing requirement. In addition, the prisoner's unusual views about what occurs after the prisoner's execution are not pertinent to the question of his present competency. Accordingly, unless the prisoner submits materials that raise a genuine dispute as to his mental capacity to understand or be aware of the fact of the impending execution and the reason for it, the threshold showing has not been met. *Id.* at 220.

4. Thompson's State Court Proceedings on His Petition of Incompetency to be Executed

The Tennessee Supreme Court applied the above-stated governing legal principles to Thompson's petition and supporting documents. The record reflects that the State of Tennessee afforded Thompson counsel and gave him the opportunity to present any material for the court to consider in making a determination of whether he raised a genuine, substantial issue as to his competency-to-be-executed claim. Despite the opportunity to do so, Thompson failed to make a threshold showing of incompetence sufficient to warrant a evidentiary hearing on the issue. In Tennessee the inmate is permitted to submit to the court any material relevant to the factfinder's decision about the individual's competency to be executed. Indeed, Thompson was permitted and did submit that evidence which he determined was relevant to the trial court's inquiry of his competency. In addition, he submitted evidence which he determined was relevant to the Supreme Court of Tennessee's inquiry regarding his claim of a change in his mental status.

The Tennessee Supreme Court found that the expert reports, conservatorship proceedings records, and the prison records did not establish a genuine issue of disputed fact regarding Thompson's competency to be executed. First, the court observed that approximately eight months prior to the court's review, Thompson's counsel was successful in having the Davidson County Probate Court terminate a conservatorship for Thompson that had been in place since March 2001.[9] Second, the Tennessee Supreme Court concluded a review of the attached prison records relating to Thompson's mental health illustrated Thompson remains aware that he has been sentenced to death for the murder of Brenda Lane. Third, the Tennessee Supreme Court found that the reports of Dr. Rabun, Dr. Woods, and Dr. Sultan were insufficient to raise a genuine issue regarding Thompson's present competency to be executed. Rather, the state supreme court concluded the expert reports indicated Thompson is aware of the fact of his impending execution and the reason for it. And finally, after acknowledging the final exhibits attached to

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[9] Incompetence is not the standard for appointment of a conservator under Tennessee law. In March 2001, Thompson was found to be "disabled" within the meaning of Tennessee Code Annotated section 34-1-101(7) and in need of the protection and assistance of a conservator. A "disabled person" is defined by the conservatorship statute as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity." Tenn. Code Ann. § 34-1-101(7)(2001).

Thompson v. State, 134 S.W.3d 168, 179 n.10 (Tenn. 2004).

Thompson's petition, *i.e.*, affidavits of Dana C. Hansen Chavis, Thompson's current attorney, and Michael R. Chavis, an investigator with the Federal Defender Services, the court concluded that although Thompson's petition and supporting exhibits establish that he is mentally ill, these submissions did not raise a genuine issue regarding Thompson's competency. *Thompson v. State*, 134 S.W. 3d at 179.

The Tennessee Supreme Court made some very specific findings when it reviewed the reports of the three mental health experts who concluded Thompson was not competent to be executed. The court determined that although the reports indicate Thompson suffers from mental illness, described as schizophrenia, chronic undifferentiated type, the reports did not present facts indicating Thompson is unaware of his impending execution and the reason for it.

> Although each of the experts ultimately opines that Thompson is presently incompetent to be executed, these opinions, standing alone with no underlying factual basis, are not sufficient to give rise to a genuine issue regarding Thompson's present competency. Significantly, the reports of all three experts either explicitly, or as part of the factual bases underlying their opinions, illustrate that Thompson presently is aware of the fact of his impending execution for the murder of Brenda Lane.

Thompson v. State, 134 S.W.3d at 180.

The Supreme Court of Tennessee provided a detailed and accurate summary of the medical

testimony which the Court adopts herein and will not replicate. *See Thompson v. State,* 134 S.W.3d at 180-182. However, this district court has conducted its own review of all the evidence and will summarize herein the matters considered pertinent to the determination of petitioner's competency to be executed.

On March 1, 2004, Thompson submitted a petition in the Circuit Court of Coffee County, Tennessee, requesting a competency hearing. Thompson attached copies of records to his petition which demonstrated he had been treated for mental illness for almost twenty years. Included in the records were reports of mental health professionals who offered their opinions that Thompson was not competent to be executed. In addition, Thompson's federal attorney and investigator submitted affidavits describing Thompson's delusional beliefs about his upcoming execution.

The State's response to Thompson's request for a competency hearing in the Circuit Court of Coffee County asserted that Thompson's submissions failed to create a genuine issue of disputed fact about his present competency for execution and, therefore, did not meet the threshold requirement under *Van Tran* for an evidentiary hearing. The Circuit Court of Coffee County agreed with the State and determined Thompson failed to create a genuine issue of disputed fact about his present competency for execution.

a. **Dr. John S. Rabun**

Dr. John S. Rabun, a psychiatrist from St. Louis, Missouri, conducted two interviews with Thompson: (1) March 17, 2003, lasting about two and one-half

hours; and (2) January 19, 2004, lasting about two hours. In addition, Dr. Rabun reviewed numerous other sources of information. Dr. Rabun explained to Thompson that he had been retained "to form an opinion as to whether he is afflicted by a mental disease and his capacity to be executed" [Addendum No. 6, Exhibit 8]. Dr. Rabun advised Thompson he should consider his statements to the examiner on the record and cautioned him that it was likely that what he said would be included in a report to be reviewed by his attorney, the state's attorney, and the judge.

According to Dr. Rabun's report, Thompson first provided details of his personal family history to Dr. Rabun which appear to be consistent with other sources of his personal family history. After providing some accurate information, Thompson asserted he was not the product of his parents because he did not look like them. Then, according to Dr. Rabun, Thompson derailed and began alleging he had raped his sister. Dr. Rabun's report discusses Thompson's delusions. In addition, Dr. Rabun's report reflects that when he questioned Thompson about the reason for his incarceration, Thompson "readily admitted that he 'killed Brenda Lane.'" [Addendum No. 6, Exhibit 8, at 7]. Thompson provided accurate details surrounding the murder and never claimed he was innocent or someone else committed the crime. Thompson explained that he was convicted of first degree murder, and during the second phase of his trial he was sentenced to death. Although Dr. Rabun explains that Thompson then derailed into a delusion, this Court notes that the delusion itself demonstrates Thompson is aware is of his conviction. Thompson stated that because he is actually a lieutenant in the Navy, the jury should have been composed of professional people,

and since it was not, the case should be thrown out. Thompson also discussed the fact that his status as a lieutenant in the Navy is a mitigator so he should receive a second trial. Additionally, Thompson stated that his earning a Grammy award and having a million dollars will prove he is rehabilitated and not a criminal [Addendum No. 6, Exhibit 8, at 7]. These delusions acknowledge Thompson's conviction and incarceration.

Dr. Rabun explained that at times Thompson was focused and his thoughts were logical and goal-directed but at times he derailed onto delusional information. However, it is important to note what Dr. Rabun did not state; he did not state that when Thompson explained he was convicted of first degree murder and was sentenced to death Thompson did not understand what he was saying. Thompson told Dr. Rabun he did not think the State of Tennessee could execute him because the songs and the money would mitigate his sentence even though "we know who did the crime, me. . . ." [Addendum No. 6, Exhibit 8, at 13]. Thompson's delusions reflect that he is aware he is sentenced to death for committing a crime. Dr. Rabun's conclusion that Thompson lacks the mental capacity to understand the fact of his impending execution and the reason for it is not supported by the factual evidence in his report. Moreover, Dr. Rabun has failed to reconcile the portion of his report reflecting that Thompson admitted he murdered Brenda Lane and was sentenced to death for that crime with his conclusion that Thompson lacks the mental capacity to understand the fact of his impending execution and the reason for it.

Finding that Dr. Rabun's ultimate opinion of incompetence was based upon Thompson's alleged delusional beliefs about his personal status and identity; the State's ability to carry out the death sentence; the likelihood that the sentence will actually be carried out; and what will happen to him upon execution, the Tennessee Supreme Court, noting they had previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution in *Coe*, concluded that Dr. Rabun's report "clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions." *Thompson v. State*, 134 S. W.3d at 181. Consequently, taking his report as a whole, Dr. Rabun's report supports the state courts finding that Thompson is aware he is sentenced to death for murdering Brenda Lane.

b. **Dr. George W. Woods**

Thompson's second expert was Dr. George W. Woods. Dr. Woods' February 27, 2004 report reflects that he was asked to answer two specific questions:

1. Does Mr. Thompson suffer a mental disease/defect?
2. If he does suffer from a mental disease/defect, what impact does it have, if any on his competency to be executed?

[Addendum 6, Exhibit 10].

Dr. Woods interviewed Thompson on February 17, 2004, for approximately three hours. Dr. Woods advised Thompson, as did Dr. Rabun, that the meeting was not a clinical evaluation with the usual patient/doctor confidentiality understanding.

Dr. Woods concluded that Thompson suffers from a Schizophreniform Spectrum disorder, Schizophrenia, undifferentiated type. It is also Dr. Woods' opinion that Thompson's Schizophrenia is severe and ongoing. Additionally, Dr. Woods concluded Thompson is currently incompetent to be executed. However, there is no indication that Dr. Woods arrived at this conclusion after conducting the critical inquiry required by *Van Tran* – whether Thompson is aware of the fact of his impending execution and the reason for it.

Dr. Woods reported that Thompson suffers from bizarre delusions and is "most often lost in his own world for extended periods of time[.]" [Addendum No. 6, Exhibit 10, at 3]. Dr. Woods reported Thompson believes he cannot die and there will be a two-year period in which he will stay alive once he is executed. Thompson also has delusions about why he will not be executed, including a delusion that his current conviction will be reversed because his prior position as a lieutenant in the Navy entitles him to be tried by a military tribunal which he believes will exonerate him. Thompson's other delusions include his belief that he has buried gold bars and a Grammy Award that will buy him his freedom [Addendum No. 6, Exhibit 10, at 4], and his belief that after his death he will be in Hawaii [Addendum No. 6, Exhibit 10, at 3]. Again, this Court observes that even Thompson's

delusions acknowledge he was convicted of a crime and received the death penalty.

Addressing his delusions, the Supreme Court of Tennessee explained,

> Thompson's beliefs about what will occur after his death or dissatisfaction with his conviction and sentence do not raise genuine issues regarding his competency for execution unless those beliefs preclude Thompson from being aware of the fact of his impending execution and the reason for it. Dr. Woods's report fails to illustrate that Thompson's beliefs pose such an impediment and therefore fails to establish a genuine issue under *Van Tran* regarding Thompson's present competency.

Thompson v. State, 134 S.W.3d at 182.

Dr. Woods described Thompson's thought processes as follows:

> Thought processes were often initially intact, in that Mr. Thompson could give a brief direct response to a question. Upon deeper examination of whether he truly understood his response, Mr. Thompson often derailed and became extremely loose in his associations. His thought contents are grossly psychotic, grandiose, paranoid, and delusional.

[Addendum No. 6, Exhibit 10, at 6]. Dr. Woods indicates Thompson's delusions that electrocution will not kill him and that after Thompson is electrocuted he will live at least two years, relate specifically to his

incompetence to be executed. Dr. Woods concludes Thompson is so impaired by his mental illness that he fits the United States Supreme Court's description of those deficits that preclude execution of the mentally retarded. There is nothing in Dr. Woods report to indicate that his opinion is based upon the appropriate legal standard for competence to be executed in Tennessee.

c. Dr. Faye E. Sultan

The last report was provided by Dr. Faye E. Sultan, a psychologist who had conducted periodic psychological examinations of Thompson from 1998 until her last examination on January 28, 2004. Dr. Sultan diagnosed Thompson as suffering from the psychotic mental illness known as Schizophrenia, Undifferentiated Type. Dr. Sultan stated that "[i]n a non-medicated state, Mr. Thompson is floridly psychotic. He is unaware of his surroundings and unable to identify individuals whom he knows well." [Addendum No. 6, Exhibit 12, at 2]. Dr. Sultan concluded Thompson is not competent to be executed in a non-medicated state.

However, Thompson is currently participating in a regular regimen of medications prescribed by the mental health staff at Riverbend Maximum Security Institution. Dr. Sultan acknowledges that Thompson states he knows he has been sentenced to death. However, she concludes Thompson lacks the capacity to understand the fact of his scheduled execution or the reason for it because of his delusional beliefs that his conviction will eventually be reversed and the death sentence will not be implemented. Once again,

the Court observes that Thompson's delusions acknowledge his conviction and death sentence.[10]

The issue of Thompson's competency to be executed is a very narrow issue. Under *Van Tran*, 6 S.W.3d at 266, and *Coe v. Bell*, 209 F.3d 815, 826 (6th Cir. 2000), "only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve." The record reflects that Thompson is aware he is sentenced to death for the murder of Brenda Lane.

The Tennessee Supreme Court concluded that Dr. Sultan's report was "insufficient to raise a genuine issue regarding Thompson's present competency to be executed. The expert reports indicate, rather, that Thompson is aware of the fact of his impending execution and the reason for it." *Id.* at 182.

The state court concluded that Thompson knew he was going to be executed and why he was going to be executed – precisely the conclusion required by the *Ford* and *Van Tran* standard of competency. Accordingly, this conclusion is based on a reasonable determination of the facts presented to the state

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[10] The Court considered the affidavit of counsel and petitioner's investigator. Both affidavits include Thompson's delusional response to being notified that his execution date had been scheduled. Although both affidavits included opinions that Thompson does not understand the reasons for and the implications of his execution date, neither affidavit sets forth any definition or guiding authority that indicates such opinion is based upon the appropriate legal standard for competence under Tennessee law. Moreover, neither affidavit sets forth any specific facts explaining the reason for such conclusion.

courts. Additionally, the state courts' adjudication of Thompson's competency-to-be-executed claim did not result in a decision that was contrary to, or involved an unreasonable application, of clearly established Supreme Court law.

d. Dr. Michael B. First

Thompson presented this Court with a fourth expert opinion with his original competency-to-be-executed petition [Court File No. 1, Attachment H]. There is nothing in the record to indicate this report was first presented to the state courts. Nevertheless, this Court has reviewed Dr. First's April 27, 2004 report, observing that Dr. First apparently based his opinion on Thompson's records rather than personally interviewing him. Dr. First, a heavily credentialed clinical psychiatrist, reviewed Thompson's records and concluded his delusions render him unable to understand the fact of his impending execution. Dr. First maintains that Thompson "is unable to prepare himself, mentally and spiritually for his death because he holds the delusional belief with certainty that he will not be executed" [Court File No. 1, Attachment H, p. 2]. However, Dr. First fails to provide any factual support for his conclusions and fails to reconcile Thompson's statements that he received the death penalty for killing Brenda Lane with Dr. First's conclusion that Thompson firmly holds the delusional belief that he will not be executed.

Dr. First's report is cumulative–reaching the same conclusions as Dr. Sultan and, like Dr. Sultan, failing to reconcile Thompson's acknowledgment of his impending execution for murdering Brenda Lane with the conclusion that Thompson believes he will not be

executed. Moreover, it does not appear that this report is properly before the Court, as there is no indication this report was considered by the State courts.

Subsequent to his competency-to-be-executed state proceedings, on September 29, 2005, Thompson returned to state court to pursue proceedings where he claimed he suffered from a change in his mental health. The Court will now address those proceedings.

5. No-Substantial-Change-Decision

On June 14, 2004, Thompson filed a petition for a writ of habeas corpus requesting an evidentiary hearing on his competency-to-be-executed claim. Other federal court proceedings relating to Thompson's original habeas petition prevented this Court from proceeding on Thompson's competency-to-be-executed claim until September 16, 2005, when this Court lifted the stay of execution to permit the State to file a motion to set an execution date and allow Thompson to raise the issue of present mental competency to be executed in response to the State's motion to set an execution date [Court File No. 19]. Thompson returned to state court and filed a Notice of Change in Mental Health Status asserting that since the Tennessee Supreme Court's previous determination finding he was competent to be executed, there has been a substantial change in his mental health which raises a substantial issue as to his competency to be executed.

In support of his Notice of Change in Mental Health Status, Thompson submitted the affidavit of Dr. Faye Sultan, who "noted that Thompson's psychiatric condition had deteriorated somewhat from

the time of [her] last visit with him[.]" [File No. 17, Attachment B]. Dr. Sultan averred that Thompson continued to experience major delusions and hallucinations. Further, Dr. Sultan stated "[a]lthough he knew, in a medicated state, that he had been sentenced to death, he held the delusional belief that it is impossible for him to be executed." [File No. 17, Attachment B].

Dr. Sultan explained that in the July 28, 2005 interview Thompson now believes all events in his life, including his involvement in the murder of Brenda Lane, are predestined. She stated his mental health status had changed in that he was louder and more expansive in his thoughts, and his behavior was more erratic and impulsive. Thompson reported experiencing more hallucinations and some severe suicidal thoughts. Dr. Sultan also observed that Thompson had requested additional medication to assist him in coping with these hallucinations and depressive thoughts and medical records reflected that, in fact, additional medication had been provided to Thompson in response to his request [File No. 17, Attachment B].

According to Dr. Sultan, "Thompson can speak about the subject of death on a purely theoretical level but cannot rationally talk about his own death. He insists that he will not die in an execution because 'the appropriate situation is not in place.'" [File No. 17, Attachment B]. Dr. Sultan concludes Thompson is not competent to be executed because he lacks the mental capacity to understand the fact of the impending execution and the reason for it.

In reply to the response filed by the State of Tennessee to Thompson's Notice of Change in Mental Health Status, Dr. Sultan subsequently supplemented her affidavit with an affidavit explaining what she meant in her initial affidavit [Court File No. 20]. Dr. Sultan avers that she is submitting her supplemental affidavit to clarify her opinion that Thompson is presently incompetent to be executed because he lacks the mental capacity to understand the fact of his impending execution, the reason for it, and he does not have the ability to meaningfully prepare for his own death or assist his counsel. Dr. Sultan explains that Thompson continues to deteriorate substantially as time goes on, and that the symptoms she identified in February 2004 continue to exist and prevent Thompson from being competent to execute.

In clarification of her original statement that Thompson's psychological condition has somewhat deteriorated, Dr. Sultan explained as follows:

> Whether I described his psychological condition as "somewhat" deteriorated, deteriorated or clearly changed, the extent of deterioration in Mr. Thompson's mental health condition is psychologically significant. In layman's terms, Mr. Thompson's mental health has changed and become substantially worse.

[Court File No. 20]. Dr. Sultan further explains that Thompson's ability to ask for additional medication to help him deal with his mental illness only means he has some insight into his condition, not that he has an understanding of his impending execution. Dr. Sultan describes Thompson's beliefs regarding the impossibility of his execution as follows:

Mr. Thompson continues to believe his execution is impossible. This belief has become more rigid or entrenched since my report of February 27, 2004. Since I began evaluating Mr. Thompson in 1998 his understanding is that it is impossible for him to be executed. As of July 28, 2005, Mr. Thompson's understanding about his own execution has not improved. Since 1998, Mr. Thompson's mental health status has been in flux but overall can be characterized as deteriorating. Specifically, on July 28, 2005, it was clear that his psychological condition has deteriorated and substantially changed. Mr. Thompson now holds additional irrational reasons for his understanding that he will not be executed. Mr. Thompson's irrational and delusional beliefs that it is impossible for him to be executed result from his severe psychotic mental illness. Although Mr. Thompson will sometimes acknowledge his involvement in the murder of Brenda Lane, as he did on July 28, 2005, he simultaneously and irrationally believes that Ms. Lane is still alive and that he has paid her family money. Mr. Thompson can also acknowledge that there is an execution date scheduled but his psychotic mental illness prevents him from understanding that his execution is actually impending. Because Mr. Thompson does not believe, due to his delusional belief system, that it is possible for him to be executed he does not have the ability to meaningfully prepare himself for his own death. As I reported on September 29, 2005 Mr.

> Thompson cannot rationally talk about or understand his own impending death.

[Court File No. 20].

On November 15, 2005, Dr. Sultan prepared a second supplemental report [Court File No. 27, Attachment A]. Dr. Sultan conducted another interview with Thompson on November 7, 2005, and she concluded Thompson's mental health continues to deteriorate and "[t]here remains a substantial change in his mental health." [Court File No. 27, Attachment A]. She briefly discussed his delusional beliefs and concluded Thompson did not possess the mental capacity to understand the impending execution and reason for it.

Thompson's supplemental submissions, which included reports from the prison, also contained information reflecting he was competent to be executed. For example, one report reflected that on July 18, 2005, Thompson told prison officials he was depressed because his "execution date is coming up and my sister died 2 years ago. I just found out." [Court File No.27, Attachment D].

The Supreme Court of Tennessee concluded Thompson failed to demonstrate a substantial change in his mental health since the previous determination of his competency that raises a substantial question about his present competency to be executed. The burden was on Thompson to show there had been a *substantial change* in his mental health since the previous determination of competency was made and the showing was sufficient to raise a substantial

question about the prisoner's competency to be executed. *Van Tran v. State*, 6 S.W.3d at 272.

Thompson did not meet his burden. His initial filings included Dr. Sultan's affidavit wherein she concluded Thompson's psychiatric condition had deteriorated somewhat and that his delusional beliefs had expanded such that he believed his involvement with the murder of Brenda Lane was predestined. She also explained his delusional belief that prior to his execution his life might be saved. Dr. Sultan's affidavit described Thompson's delusional beliefs but also reflected that Thompson was aware of his impending execution and the reason for it, which are the only two requirements for a finding of competency-to-be-executed under *Van Tran*. Dr. Sultan's supplemental affidavits discuss Thompson's delusions but still demonstrate Thompson is aware of his impending execution and the reason for it, *i.e.*, "Although Mr. Thompson will sometimes acknowledge his involvement in the murder of Brenda Lane, as he did on July 28, 2005, he simultaneously and irrationally believes that Ms. Lane is still alive and that he has paid her family money. Mr. Thompson can also acknowledge that there is an execution date scheduled but his psychotic mental illness prevents him from understanding that his execution is actually impending." [Court File No. 20]. Although Dr. Sultan has interpreted Thompson's delusions as preventing him from understanding that his execution is actually impending, she does not reconcile statements acknowledging his involvement with Brenda Lane's murder and the impending execution date with her conclusion that he is unaware of the punishment he is about to suffer and the reason for it.

In reviewing Thompson's challenge to the Tennessee Supreme Court no-substantial-change-decision, the Court is faced with the question of the appropriate standard of review. This uncertainty arises because section 2254(e)'s standard which provides that a state court's factual finding are presumed correct unless a petitioner offers *clear and convincing contrary evidence, see* § 2254(e)(1), may be a odds with section 2254(d)'s *unreasonable-determination-of-the-facts* standard for granting habeas corpus petitions. However, the Supreme Court recently suggested that the standards may merge when it explained, in *Miller El v. Dretke,* 125 S.Ct. 2317, 2325 (2005), that under AEDPA a petitioner may only obtain relief by showing the state court's conclusion was based on upon an unreasonable determination of the facts. The Court further explained that it would presume the state court factual findings were correct unless the petitioner rebutted the presumption with clear and convincing evidence. Nevertheless, even if the Supreme Court did not recognize the merger of the two standards and this Court bases its decision solely on the more lenient standard of § 2254(d)(2), the Court would reach the same conclusion: the State court's determination was not unreasonable.

Applying either standard, both standards, or just the more lenient reasonable standard to Thompson's claim the Court finds he is not entitled to habeas relief on this claim. Thompson has not presented clear and convincing evidence demonstrating that the State court determinations are incorrect, nor has he shown that Tennessee Supreme Court's decision was the result of an unreasonable determination of the facts. In the interest of caution, the Court will decide this

claim applying the more lenient reasonable standard. Therefore, applying the reasonable standard, the state court decision in Thompson's case will be considered to be based upon an unreasonable determination of the facts only if it was objectively unreasonable to find that Thompson did not show there had been a substantial change in his mental health (that raised a substantial question about his present competency to be executed) since the previous determination of his competency. *See Rice Collins,* 126 S.Ct. 969 (2006) ("Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge.").

Accordingly, based on the record before the state court, primarily Dr. Sultan's affidavits stating that Thompson acknowledges he murdered Brenda Lane and he received the death penalty because he committed that crime, the decision of the Tennessee Supreme Court concluding that Thompson did not show that there had been a substantial change in his mental health since the previous determination of his competency, is not an unreasonable determination of the facts presented in state court. Dr. Sultan's affidavit demonstrates that Thompson is having more of the same kind of problems he had when Dr. Sultan found him incompetent in 2004. Dr. Sultan avers that Thompson *continues* to believe his execution is impossible [Court File No. 20, p.2, ¶ 8]. This shows that Thompson is continuing the delusions that the state court considered in Thompson's initial

competency-to-be-executed petition. Dr. Sultan explains Thompson is experiencing more expansive thoughts and a greater number of delusional beliefs. Although the concept of "more" adds weight to the irrational thoughts and beliefs, it does not signal a change in whether he understands the fact of his execution or the reason for it. Dr. Sultan avers that since 1998 Thompson has believed it is impossible for him to be executed; consequently, this is not new information and does not constitute a substantial change in his mental health since the previous determination of his competency to be executed in 2004. Needless to say, this information does not raise a substantial question about his present competency to be executed.

A thorough review of the state court record reflects Thompson has not demonstrated that, under § 2254(d)(2), the state court's decision was based upon an unreasonable determination of the facts in light of the evidence before it. Accordingly, Thompson is not entitled to any habeas relief on his no-substantial-change claim.

6. Conclusion: Competency-To-Be-Executed Claim

The evidence before this Court reflects Thompson suffers from a severe mental illness with psychotic features. In addition, the record indicates that although Thompson is mentally ill and expresses several delusional beliefs, including that his conviction will be reversed and that his gold bars and Grammy Award will mitigate his death sentence, the expert reports reflect that Thompson knows he is sentenced to death for murdering Brenda Lane. In addition, his

delusions acknowledge his criminal conviction and impending death sentence. "*Ford* does not require the state convicting court to ignore other evidence indicating that, despite his delusional beliefs, [a habeas petitioner] is aware that he is going to be executed for [] capital murder . . . in determining whether [the habeas petitioner] has made the threshold showing of a [genuine dispute] as to his competency to be executed." *Patterson v. Dretke*, 370 F.3d 480, 486 (5th Cir.), *cert. denied*, 541 U.S. 1058 (2004). The experts express doubt about Thompson's rational and factual understanding that he is to be executed. However, they do not address Thompson's acknowledgment that he is being executed for murdering Brenda Lane and the fact that his delusions that his *conviction* and *death sentence* will be reversed reflect his knowledge that he was convicted of murder and received a death sentence. Additionally, the experts do not reconcile the inconsistency between Thompson's acknowledgments and delusions of his impending death sentence for the murder of Brenda Lane with their opinion that Thompson may lack understanding that he is going to be executed and the reason why.

Thompson's delusions do not consist of a perception that he did not commit murder or that he did not receive the death sentence for the murder, but rather, his delusions pertain to circumstances he claims will result in him being awarded a new trial and sentencing hearing. Thompson's delusional beliefs do not bear on the question of whether he knows he is sentenced to be executed for committing a murder. Thompson's experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather, that his perception of himself

and his perception of the future is at times distorted by a delusional system in which he believes he is a rich song writer who will receive a new trial because he was previously a lieutenant in the Navy.

For this Court to grant Thompson's application for a writ on this claim, it must find that the conclusions reached by the trial court and the Tennessee Supreme Court as to Thompson's failure to make a threshold showing that a genuine issue exists regarding his present competency to be executed, and the Tennessee Supreme Court's decision that Thompson failed to demonstrate a substantial change in his mental health since the previous determination of his competency, are objectively unreasonable or contrary to United State Supreme Court precedent or an unreasonable determination of the facts. This Court cannot reach such a conclusion.

Accordingly, Thompson is not entitled to habeas relief on his competency-to-be-executed claim. The conclusions by the state courts that Thompson failed to meet the threshold showing required under *Ford* and *Van Tran* to mandate a hearing and that Thompson failed to demonstrate a substantial change in his mental health since the initial determination of his competency, were not contrary to or an unreasonable application of federal law, nor an unreasonable determination of the facts. Although, the Court has adequately addressed Thompson's incompetent-to-be-executed claim, it will further address the specific sub-claims raised by Thompson, at least to the extent the Court is able to decipher those claims.

Thompson includes what appears to be three sub-claims within his incompetent-to-be-executed claim. The Court will now address these sub-claims. Although the claims Thompson attempts to assert in sub-claim I, II, and III are not clear, the Court construes them as claims attacking the application of the *Ford* procedures. Sub-claim I, The State Shall Not Execute The Insane, consists of the law and presumably a claim that Thompson is insane. Subsection II, Tennessee's Implementation of *Ford v. Wainwright*, attacks Tennessee's application of *Ford's* threshold showing as clearly wrong and unreasonable under controlling law [Court File No. 41, at 62]. Sub-claim III, Tennessee's Implementation of *Ford v. Wainwright,* is an assertion that Tennessee's *Ford* proceedings as applied to Thompson failed to satisfy due process. The Court will now address these claims individually.

a. The States Shall Not Execute The Insane[11]

Although Thompson has not clearly stated an issue under this sub-claim, the Court construes this claim as an assertion by Thompson that he is insane. Thompson, relying upon *Ford v. Wainwright,* 477 U.S. 399 (1986), claims his execution is barred because he is insane. In *Ford*, the Supreme Court of the United States ruled that the Eighth Amendment prohibits execution of a defendant who is insane. The Supreme Court did not define insanity in the majority opinion, but instead, left to the states "the task of developing

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[11] Insanity and incompetency have substantially the same meaning in this context.

appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 416. Following *Ford,* some states adopted statutory schemes to govern the determination of mental competency in death penalty cases. Tennessee, however, has not adopted a statutory definition of competency for use in death penalty cases. Instead, the Supreme Court of Tennessee adopted and set forth the procedure that a prisoner sentenced to death must follow in order to assert his constitutional rights to challenge his competency to be executed in *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999). This procedure was followed in Thompson's case.

The Tennessee Supreme Court, agreeing with Justice Powell's opinion in *Ford* concluded "that in a proceeding to determine competency to be executed, only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve." *Id.* at 266. As previously discussed in this opinion, Thompson has not demonstrated that his sanity raises a genuine issue or that he is insane. Consequently, Thompson's execution will not violate "[t]he central holding of *Ford* . . . that the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane," *Ford v,. Wainwright,* 477 U.S. at 409, because, as the Court has previously concluded in this memorandum opinion, Thompson has failed to demonstrate he is incompetent to be executed. Consequently, Thompson has not demonstrated that he is insane, thus his execution is not unconstitutional.

b. Tennessee's Implementation of *Ford v. Wainwright*

Next, Thompson claims Tennessee's application of *Ford's* "threshold showing" is clearly wrong and unreasonable under controlling law. With respect to the standard of review to be applied by this Court to Thompson's habeas petition, the Supreme Court has made clear that unreasonableness means more than erroneously or incorrectly. *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Consequently, the portion of Thompson's claim asserting Tennessee's application of *Ford's* threshold showing is clearly wrong is not cognizable in this habeas proceeding.

In effect, Thompson is claiming he submitted evidence demonstrating a genuine question regarding his present competency, but the state courts "paid mere lip service to *Ford* and its own standards in *Van Tran* when it failed in Thompson's case to follow neither and, as a result denied Thompson a hearing." [Court File No. 41, at 63]. The Court of Appeals for the Sixth Circuit has previously approved the Tennessee Supreme Court's adoption of Justice Powell's standard for establishing the standard for competency to be executed and by placing the burden of proof on a prisoner to make a threshold showing of incompetence for a hearing. *Coe v. Bell*, 209 F.3d 815, 821 (6th Cir. 2000).

Initially, the Court observes that the placement of the burden of proof on Thompson to prove, by a preponderance of the evidence, that his competency is genuinely in dispute is not unconstitutional and is not an unreasonable application of Supreme Court precedent. *See Coe v. Bell*, 209 F.3d 815, 828 (6th Cir.

2000); *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). In *Ford*, Justice Powell observed that a petitioner does not make his competency-to-be-executed claim against a neutral background. Observing that "in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court[,]" Justice Powell concluded the State may presume the petitioner is sane and "may require a substantial threshold showing of insanity merely to trigger the hearing process." *Ford*, at 426. Accordingly, it appears that the standard to trigger a hearing and the standard for competency to be executed in Tennessee, as set out in *Van Tran*, meets constitutional muster. In Tennessee, a prisoner is not entitled to a hearing on the issue of competency unless he makes a threshold showing that a genuine, disputed issue exists regarding the prisoner's present competency. *Van Tran* at 268; *see also Coe*, 17 S.W.3d at 211. Thompson did not make such a showing, thus, he was not entitled to a hearing in state court.

As explained above, the state court's decision that Thompson failed to make a threshold showing that his competency to be executed presented a genuine dispute is neither an unreasonable determination of the facts nor contrary to, or an unreasonable application of Supreme Court precedent. Consequently, the threshold showing standard applied by the Tennessee courts in the instant case was neither clearly wrong nor unreasonable under controlling law. Accordingly, the state court application of *Ford's* "threshold showing" is neither contrary to, nor an unreasonable application of Supreme Court precedent.

c. Tennessee's *Ford* Proceedings Failed to Satisfy Due Process

In his last sub-claim, Thompson contends the state court proceedings failed to satisfy due process as required by *Ford*. The procedure identified by the Tennessee Supreme Court in *Van Tran* requires a prisoner to raise the issue of competency to be executed in the Tennessee Supreme Court when filing a written response to the motion of the state attorney general to set an execution date. The prisoner has ten days from the filing of the motion of the Tennessee Attorney General to file a response and raise the issue of competency to be executed. Once the motion is granted and execution date scheduled, the competency-to-be-executed issue is ripe and the Tennessee Supreme Court remands the issue of competency to be executed to the trial court where the prisoner was originally tried and sentenced for a determination of the issue. *Id.* at 267.

The trial court determines whether a hearing is warranted; and this decision depends on whether the prisoner has made the required threshold showing that his competency to be executed is genuinely at issue. *Id.* at 268. The Tennessee procedure places the burden on the prisoner to make a threshold showing that he is presently incompetent. To meet this burden, the prisoner may submit affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists genuine questions regarding the prisoner's present competency. The *Van Tran* Court emphasized "that the proof required to meet the threshold showing must relate to *present* incompetency." *Id.* at 269. The *Van Tran* Court also

noted that "unsupported conclusory assertions of a family member of the prisoner or an attorney representing the prisoner will ordinarily be insufficient to satisfy the required threshold showing." *Id.* If the trial court is satisfied there exists a genuine dispute regarding the prisoner's present competency, then a hearing will be held.

The Sixth Circuit has previously approved the Tennessee procedures used to dispose of a *Ford* claim.

> Given Justice Powell's opinion in *Ford*, we believe that '[a]s long as basic fairness is observed' in a prisoner's competency-to-be-executed determination, a state has 'substantial leeway to determine what process best balances the various interests at stake.' *Ford*, 477 U.S. at 427. . . . (Powell, J., concurring). Accordingly, we must give the Tennessee courts substantial discretion in fashioning the procedures employed in . . . competency proceedings.

Coe, 209 F.3d at 828. The *Coe* court determined the Tennessee state court's proceedings assessing Coe's *Ford* claims satisfied the requirements of due process.[12] The Sixth Circuit specifically concluded "the Tennessee Supreme Court properly followed the narrow concurring opinion of Justice Powell in establishing the standard for competency to be executed . . . ." *Id.* at 821.

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[12] The trial court determined *Coe* was entitled to a hearing because he had satisfied a threshold showing that there existed a genuine disputed issue regarding his competency to be executed

Thompson equates his mental illness to being incompetent to be executed. However, a person can suffer from mental illness and still be competent to be executed. *See Walton v. Johnson*, 440 F.3d 160, 174 n.15 (4th Cir. 2006) ("As both Drs. Pandurangi and Mills stated, whether an inmate is mentally ill is a different concept from whether an inmate is mentally incompetent to be executed."); *Coe v. Bell*, 89 F.Supp. 2d 922, 931 (M.D. Tenn. 2000) ("Dr. Kenner further stated that you could have a mental illness and still be competent to be executed."); *White v. Horn*, 54 F.Supp.2d 457, 468 (E.D. Pa. 1999) ("The court also appropriately gave weight to Dr. Sadoff's testimony that . . . Mr. Heidnik is not psychotic, and that his paranoid schizophrenia, including unrelated delusions, does not mean he is incompetent."); *Barnard v. Collins*, 13 F.3d 871, (5thCir. 1994) ("Dr. Edward B. Gripon, . . . testified that although Barnard suffered serious delusions, Barnard understood the fact of his impending execution and the reason."); and *Garrett v. Collins*, 951 F.2d 57, 59 (5thCir. 1992) ("[W]e are persuaded that this belief or hope [that his dead aunt will protect him from the effects of the sedative and toxic agents used to execute him] Garrett holds does not prevent the state from executing him under the *Ford v. Wainwright* standard.").

Thompson's claim, that the uncontradicted evidence of his mental illness, in effect, mandates that he be provided an evidentiary hearing on his competency, is flawed because a person who is mentally ill can still be competent. In Thompson's case, Tennessee's implementation of the *Ford v. Wainwright* and *Van Tran v. State* procedures satisfied due process and did not violate the Eighth and Fourteenth Amendment to the United States

Constitution. In addition, the "cognitive test" adopted in *Van Tran*, "that under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to *understand* the fact of the impending execution and the reason for it"[13] was properly applied to Thompson. The Supreme Court of Tennessee concluded "[t]he reports of Thompson's mental health experts show that, despite any delusions, Thompson *understands* that he is going to be executed for murdering Brenda Lane." *Thompson v. State*, 134 S.W.3d 168, 183 (Tenn. 2004) (emphasis added).

Tennessee provided Thompson with the basic fairness that *Ford* requires, namely, the opportunity to be heard. Thompson availed himself of that opportunity when he submitted reports from his experts and his medical records. The fact that Tennessee denied Thompson an evidentiary hearing does not violate due process as explained in *Ford*. Thompson's experts did not demonstrate that Thompson is unable to understand he is sentenced to death and why the death sentence was imposed upon him. Therefore, the trial court was justified in finding that Thompson had failed to present sufficient evidence to meet the threshold showing sufficient to warrant a hearing.

In addition to the instant broad due process claim contained in his third sub-claim, Thompson also included, within his third sub-claim, six specific alleged deficiencies that he contends demonstrates the Tennessee courts ventured so far afield of *Ford* that

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[13] *Van Tran v. State*, 6 S.W.3d at 266 (emphasis added).

they failed to satisfy the due process as required by *Ford*. Thompson claims the following six deficiencies in the state court process demonstrate the Tennessee courts denied him due process.

(1) The Tennessee Supreme Court Failed to Consider Relevant Evidence

Thompson maintains that contrary to *Ford* the Tennessee Supreme Court failed to consider relevant evidence. *Ford* provides that the "adversary presentation of relevant information be as unrestricted as possible." *Ford v. Wainwright*, 477 U.S. at 417. The Tennessee Supreme Court in *Van Tran* emphasized "that the proof required to meet the threshold showing must relate *to present* incompetency. Therefore, by definition, at least some of the evidence submitted must be the result of recent mental evaluations or observations of the prisoner." *Van Tran v. State*, 6 S.W.3d at 269 (emphasis in original). The *Van Tran* court also concluded that if the only evidence offered relates to the prisoner's distant past competency or incompetency, the threshold showing will not be made. In addition, the court noted that "unsupported conclusory assertions . . . of an attorney representing the prisoner will ordinarily be insufficient to satisfy the required showing." *Id.*

Thompson contends "the Tennessee Supreme Court's opinion focused almost exclusively on a laundry list of evidence which it declared would categorically be considered in its 'threshold' inquiry and focused on few facts which it deemed unfavorable to a determination of insanity." [Court File No. 41, at 68] Thompson complains the Tennessee Court failed

to consider evidence of Thompson's past incompetency, unsupported conclusory allegations that Thompson is mentally ill, Thompson's "unusual views about what occurs after" the execution, and his "delusional and unorthodox beliefs." [Court File No. 41, at 68]. Thompson is simply incorrect in his contention that the Tennessee Supreme Court failed to consider relevant evidence.

The Tennessee Supreme Court conducted a *de novo* review. The state court considered the eighteen exhibits attached to Thompson's petition.[14] In compliance with the dictates of *Van Tran*,[15] the state supreme court determined Thompson's stale history of mental illness was not relevant to the issue of *present* competency. Nevertheless, the state court did review the prison records relating to Thompson's mental health history and concluded they illustrated Thompson remains aware he has been sentenced to death for the murder of Brenda Lane.

Contrary to Thompson's assertion that the Tennessee Supreme Court failed to consider relevant evidence, all evidence submitted by Thompson in

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[14] The exhibits consisted "of records detailing Thompson's history of mental illness while in custody of the Tennessee Department of Corrections for the murder of Brenda Lane; materials regarding the appointment and later termination of a conservator to supervise Thompson's medication; affidavits from Thompson's attorney and investigator in the federal proceedings; and the reports and curricula vitae of three mental health professionals, who have examined Thompson within the last three months and opine that he is incompetent to be executed." *Thompson v. State*, 134 S.W.3d at 178.

[15] 6 S.W.3d at 269.

support of his petition was considered by the Tennessee Supreme Court during their *de novo* review. The court identified and discussed the evidence presented by Thompson. Considering all the evidence submitted by Thompson, the Tennessee Supreme Court, observing that a prisoner who suffers from a mental disease or disorder does not automatically equate to a finding of incompetency to be executed, concluded the reports of the mental health experts demonstrated that, despite any delusions, Thompson understands he is going to be executed for murdering Brenda Lane. Accordingly, Thompson's claim that the Tennessee Supreme Court failed to consider relevant evidence is without merit. The Court now turns to the second of the six deficiencies alleged by Thompson — that the state courts refused to consider whether he could meaningfully prepare for death.

(2) Refusal to Consider Thompson's Ability to Prepare for Death

Thompson challenges Tennessee's failure to consider whether an inmate can meaningfully prepare for his death. Thompson proposes that competency for execution requires that a condemned inmate have the capacity to prepare himself for his death.

Ford mandates no such requirement. In *Ford*, Justice Powell observed in dicta that "only if the defendant is aware that his death is approaching can he prepare himself for his passing." The dicta in Justice Powell's opinion is not part of the test to determine whether a death row inmate is competent to be executed. Read in context, it is clear that Justice Powell did not include this as a required element of his

test. In fact, Justice Powell made his two-part test explicitly clear. Justice Powell clearly stated, "I would *hold* that the Eighth Amendment forbids the execution *only* of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Ford*, 477 U.S. at 422 (emphasis added). Consequently, the Eighth Amendment does not require that an inmate have the capacity to prepare for his passing to be deemed competent to be executed.

Accordingly, the Tennessee courts failure to consider whether Thompson could meaningfully prepare for his death was neither contrary to nor an unreasonable application of Supreme Court jurisprudence. This issue is without merit.

(3) Unreasonable Application of Presumption of Competency

Thompson asserts the state court's automatic application of a presumption of competency was unconstitutional because Thompson has a history of mental illness. The district court first observes that mental illness does not necessarily equate to incompetency. Consequently, the fact that Thompson suffers from mental illness does not prohibit the state courts from presuming he was competent.

Thompson has been involved in court proceedings since 1985, and there is no evidence before this Court indicating that, during the past twenty plus years of criminal proceedings, he has ever been declared incompetent. Although Thompson has made his mental condition an issue since he was arrested for the murder of Brenda Lane in 1985, there is nothing in the record reflecting Thompson has ever been found

incompetent. Prior to trial, at defense counsel's request, Thompson was committed for a thirty-day mental evaluation at Middle Tennessee Mental Health Institute, after which he was found to be competent to stand trial, sane at the time of the offense, and not committable. *State v. Thompson*, 768 S.W.2d 239, 248 (Tenn. 1989). Thompson presented testimony of a clinical psychologist at the sentencing phase of his murder trial and during post-conviction proceedings he challenged the performance of trial counsel for failing to investigate fully certain head injuries and "mental problems." However, there is no evidence that Thompson has ever been legally adjudged incompetent. Additionally, the records from the conservatorship proceedings do not reflect those proceedings involved a finding of incompetency. Consequently, Thompson has not demonstrated that the state court unreasonably applied a presumption of competency.

Applying the *Ford* and *Van Tran* procedures, the Tennessee Supreme Court observed that a prisoner is presumed competent in these proceedings because the prisoner is asserting competency "following a trial and sentencing hearing at which his sanity was either conceded or determined by the court." *Thompson v. State*, 134 S.W. 3d at 176. Consequently, Thompson has failed to provide any evidence that the state court's application of the presumption of competency to Thompson was unreasonable or unconstitutional. Accordingly, Thompson is not entitled to any habeas relief on this claim.

(4) Denial of Hearing Based on Incorrect Standard

Thompson asserts the Tennessee Supreme Court required him to conclusively prove insanity before granting a hearing instead of applying the "threshold showing" standard. This allegation is simply incorrect.

Thompson claims the Tennessee Supreme Court's reliance upon the four factors in Dr. Rabun's report which suggested Thompson retains the capacity to be executed, to the exclusion of the eight factors which suggested Thompson lacks the capacity to be executed, was unreasonable.

Dr. Rabun's report included his subjective interpretation of Thompson's delusions. However, the delusions Dr. Rabun relied upon to support his interpretation that Thompson's delusions suggest Thompson lacks the capacity to be executed, are delusions that, in and of themselves, acknowledge Thompson knows that he is sentenced to death for committing a crime. One of Thompson's delusions is his belief that counsel should retrieve his buried gold bars, one million dollars, Grammy Award, and two stock certificates to use as a "mitigator." Thompson also stated he was a lieutenant in the Navy and as such, his first trial included an incorrect jury, thus, rendering his first trial invalid. Thompson believes the buried evidence should be given to the Secretary of the Navy to help with mitigation at the new trial to which he believes he is entitled. According to Dr. Rabun, Thompson "holds magical, near child-like reasoning about possible avenues of appeal in the present case." [Addendum No. 6, Exhibit 8, at 12-13].

Dr. Rabun's report reflects that although Thompson "knows his sentence is death, he does not appreciate that the State of Tennessee can legally execute him." Dr. Rabun bases this conclusion on Thompson's delusion that if his attorney will retrieve the buried evidence it can be used to help with mitigation at the new trial to which he believes he is entitled [Addendum No. 6, Exhibit 8, at 13]. In addition, Thompson told the examiner his preferred method of execution is the electric chair because he is used to being shocked. Thompson claimed he is shocked when he touches his TV and it felt like a shock when the chiropractor twisted his neck. Dr. Rabun interpreted this statement to suggest that Thompson lacks the capacity to appreciate the finality of the execution process due to his mental disease because he compares lethal electrocution to common static electricity or a chiropractic procedure. Nevertheless, regardless of Dr. Rabun's subjective interpretation of Thompson's comments, the evidence in the record supports the state court findings that Thompson knows he is sentenced to death for the killing of Brenda Lane.

Although the Tennessee Supreme Court stated that unsupported conclusory assertions will be insufficient to satisfy the required threshold showing to justify a hearing, as will allegations that the prisoner is mentally ill and possesses unusual views about what occurs after the prisoner's execution, the Court did *not* require Thompson to conclusively prove insanity. *Thompson v. State*, 134 S.W.3d at 177. To the contrary, the state court concluded that "[w]hile Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding Thompson's competency." *Id.* at 183. The Tennessee Supreme Court, observed that "[u]nless the

prisoner submits materials that raise genuine disputed issues about the prisoner's mental capacity to understand or be aware of the fact of the impending execution and the reason for it, the threshold showing has not been met[,]." That court thereby applied the proper governing standards articulated in *Ford* and *Van Tran*, and concluded Thompson failed to establish a genuine issue regarding his competency because "[t]he reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane." *Thompson v. State*, 134 S.W.3d at 183.

The Tennessee Supreme Court did not require Thompson to conclusively prove insanity before granting a hearing, but instead reasonably applied the "threshold showing" standard which Thompson failed to meet. Accordingly, Thompson's claim that the Tennessee Supreme Court required him to conclusively prove insanity before granting a hearing is simply incorrect and without merit. This claim does not entitle Thompson to habeas relief and it will be **DISMISSED.**

(5) Tennessee Supreme Court's Inadequate Review

Thompson asserts that, contrary to the due process teachings of *Ford*, the Tennessee Supreme Court reviewed and issued a wholesale affirmance of the lower court's decision, which, not only was entered by a disqualified jurist, but adopted in whole the state's position without providing a neutral review of the evidence [Court File No. 41, at 87]. The court will address Thompson's claim that the judge was

disqualified separately and prior to addressing his claim that the Tennessee Supreme Court's review was inadequate.

(a) Disqualified Jurist

Thompson contends his "right to due process of law was violated when the original trial judge, who recused himself from this case because of 'compelling circumstances,' subsequently presided over the competency proceedings and entered the order denying Thompson a competency hearing." [Court File No. 41, at 8]. The Tennessee Supreme Court addressed this issue. Therefore, to grant Thompson relief on this claim, this Court must conclude that the state court decision was based on an unreasonable determination of the facts or that the decision was contrary to, or an unreasonable application of Supreme Court precedent. Some history surrounding the trial court judge's role in Thompson's prior proceedings will be helpful in understanding this claim.

The trial court judge, Judge Gerald Ewell, was the presiding judge during Thompson's criminal murder trial. At Thompson's trial and in the Rule 12 Report,[16]

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[16] Tennessee Supreme Court Rule 12 requires the trial judge to complete a report in all cases in which a defendant is convicted of first-degree murder. The report is transmitted to the Clerk of the Tennessee Supreme Court within fifteen (15) days after the trial court rules on a motion for new trial. A portion of the report is prepared by the district attorney general and a portion is prepared by the defense attorney. Counsel submits the report with the completed sections to the trial judge. The trial judge completes the court's portion of the report and counsel review the completed

Judge Ewell commended defense counsel's performance. Thompson filed a successful motion to disqualify Judge Ewell from presiding over his state post-conviction proceedings on the basis that Judge Ewell's earlier remarks showed that he had "prejudged" the issue of ineffective assistance of counsel. *Thompson v. State*, 134 S.W.3d at 174 n. 4. According to Thompson, he failed to challenge Judge Ewell's qualification in the trial court when pursuing his competency-to-be-executed claim because he had no formal notice that Judge Ewell had been assigned this case until entry of the order which is the subject of this habeas petition. *Id.*

Upon appeal of Judge Ewell's order denying him relief on his competency-to-be-executed claim, Thompson claimed the order was void because Judge Ewell recused himself from Thompson's post-conviction case. The Tennessee Supreme Court reasoned "this competency proceeding is an independent action involving a discrete issue, not a continuation of any prior proceedings." *Id.* at 173, *citing Van Tran*, 6 S.W.3d at 264 (holding that post-conviction is not the appropriate avenue for litigating the issue of competency to be executed). The state court concluded that:

> [A] claim of ineffective assistance of counsel, the basis for Judge Ewell's recusal in the post-conviction case, does not arise in this competency proceeding. In short, Judge Ewell's recusal in the post-conviction case does not

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report for accuracy and further comments before it is transmitted to the Tennessee Supreme Court.

> disqualify him from presiding in other separate and independent proceedings involving Thompson, including this competency proceeding.

This Court agrees this competency proceeding is an independent action and not a continuation of any prior proceeding. This second proceeding does not involve the same principals, witnesses, or claims as those involved in Thompson's initial post-conviction case. The basis for the judge's first recusal was that he had earlier made remarks that indicated he had prejudged the issue of ineffective assistance of counsel. This case is a separate case from Thompson's initial state post-conviction petition. This case does not challenge his criminal conviction, sentence, or trial counsel's effectiveness. The issues in the instant case are solely related to Thompson's present competency to be executed. Moreover, there is neither a claim of any bias by the trial judge nor evidence of bias in the record. Furthermore, this case is not a continuation of any prior proceeding but rather, is an entirely different case from the case in which Judge Ewell recused himself. Thompson's main challenge is based on the argument that having Judge Ewell preside over these proceedings created an appearance of impropriety and not an appearance of justice. Thompson wants the nullification of Judge Ewell's decision finding that Thompson failed to meet the threshold requirement to proceed with his competency-to-be-executed claim, even though the Tennessee Supreme Court performed a *de novo* review.

> [M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process

> Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. But the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Bracy v. Gramley, 520 U.S. 899, 904-05 (1997) (citations omitted).

In the absence of actual bias or actual impropriety, no constitutional violation occurred. *See Falconer v. Meehan*, 804 F.2d 72, 78 (7thCir. 1986) (Applying the federal disqualification statute, 28 U.S.C. § 455, the court concluded that judicial acts taken prior to the filing of the 455 motion would not later be set aside unless actual impropriety or actual prejudice was demonstrated; "appearance of impropriety is not enough to poison prior acts"). Indeed, an appearance of impropriety does not support an inference of bias. *See Del Vecchio v. Illinois Dept. of* Corrections, 31 F.3d 1363, 1371 (1994) (A judge's mere appearance of impropriety does not render a judgment in violation of due process.)

Thompson has not demonstrated any actual impropriety or actual bias on Judge Ewell's part. Judge Ewell's recusal in Thompson's original post-conviction proceeding was based on his predetermination that trial counsel represented Thompson "as vigorously and competently as if there were being paid a million dollars." The previous

recusal was not related in any way to Thompson's claim that he is presently incompetent to be executed. Thompson has failed to direct the Court's attention to any Supreme Court precedent which requires habeas relief on this sub-claim.

Accordingly, since Thompson has neither demonstrated that the factual determination of the state court is unreasonable nor that the state court decision was contrary to or an unreasonable application of federal law, he is not entitled to habeas relief on this claim. The Court will now turn to the second claim raised under this sub-claim.

(b) Denial of Neutral and Independent Adjudication of Facts and Law

Thompson asserts the Tennessee Supreme Court acted contrary to established law when it sanctioned the trial court's adoption of the State's responsive pleading into its order and provided no independent evaluation or analysis of its own. Thompson bases his claim that he was denied a neutral and independent adjudication of his case primarily upon the statement in the trial court's order that "[i]n this case many of the assertions made by the State in response to said petition came to the mind of the undersigned while reading the petition, and the State's response generally enunciates the opinion and findings of this Court." [Addendum 8, at 2]. Thompson's claim that "the state court's order did not reliably and fairly resolve the disputed issues and did not reflect independent judicial judgment because the court simply adopted the state's response" is incorrect. The state court noted that while reading the petition the

court reached the same conclusions as those advanced by the State in its response. This observation and the Tennessee Supreme Court's ultimate adverse ruling to Thompson's petition provides no basis for his allegation that the state court's judgment is based on a lack of independent judicial judgment.

The trial court's judgment reflects that the court concluded that the reports submitted by the three experts clearly demonstrate Thompson is presently aware that he is under a death sentence for the murder of Brenda Lane. In addition, the Tennessee Supreme Court conducted a *de novo* review, and such review would have cured any inadequate review by the trial court.

The Tennessee Supreme Court ultimately determined that since the trial court concluded Thompson's written submissions failed to meet the threshold showing required for a hearing, findings of facts were not necessary. Furthermore, the Tennessee Supreme Court reviewed Thompson's case *de novo* with no presumption of correctness afforded to the trial court's determination. However the court specified that its "conclusion that *de novo* review is the appropriate standard should not be viewed as an acceptance of Thompson's assertion that the trial court's order 'does not reflect independent judicial judgment.'" *Thompson v. State*, 134 S.W.3d at 178 n. 9.

Accordingly, Thompson has failed to demonstrate that the state court decision was the result of an unreasonable determination of the facts or was contrary to, or an unreasonable application of Supreme Court precedent. This claim will be **DISMISSED.**

(6) Denial of Opportunity to Offer Relevant Evidence

Thompson claims he was denied access to information in the State's possession relevant to his mental state. First, Thompson complains the Tennessee Attorney General's Office obtained recordings of his telephone calls since January 2004, but both the State Attorney General's Office and the Warden of Riverbend Maximum Security Institution invoked a confidentiality provision of Tennessee's Public Records Act and refused to supply those same recordings to Thompson's counsel, thus, denying Thompson equal access to these records and violating his federal due process rights. Second, Thompson asserts there are other records to which the State has access but to which he is denied access.

This Court granted Thompson's motion for discovery to the extent that the State was ordered to provide said telephone records to Thompson. In addition, the State was ordered to provide records from the internal affairs investigation into Thompson's mental health. Although Thompson has notified the Court that he received said telephone records, petitioner has not demonstrated, nor even alleged, that the records contain material relevant evidence. In addition, the State maintains there are no records of the internal affairs investigation into Thompson's mental health because no such investigation ever occurred.

Errors in the application of state evidentiary rulings generally are not cognizable in federal habeas proceedings, unless they "offend[] some principle of justice so rooted in the traditions and conscience of our

people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996); *also see Estelle v. McQuire*, 502 U.S. 62, 69-70 (1991). There is nothing in the record demonstrating the requested evidence is material, thus, this claim is not cognizable in this habeas proceeding because there is no showing of a violation of due process. Accordingly, the alleged state evidentiary law error does not rise to the level of a federal constitutional claim and thus, warrants no relief in this habeas action since there has been no showing that the error rendered the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment. *Estelle v. McGruire*, 502 U.S. 62, 69-70 (1991). Accordingly, Thompson is not entitled to habeas relief on this claim.

B. Unconstitutional to Execute Mentally Ill Persons Whose Illness Results in Mental Deficieneies Which Diminish Culpability

Thompson's second claim is that his severe mental illness significantly reduces his ability to control his conduct and reduces his moral culpability, thus, placing him outside that class of defendants to whom the death penalty may be constitutionally applied. A claim addressing his moral culpability and his inability to control his conduct is a claim that is, in effect, challenging his conviction which should have been raised in his original habeas petition. The Court is not addressing Thompson's moral culpability or his inability to control his actions but instead is addressing his competency to be executed. The Court lacks jurisdiction to address Thompson's claims regarding his moral culpability or inability to control his actions because these claims constitute a second or successive habeas application under § 2244(b)(2).

Thompson must first obtain authorization from the United States Court of Appeals for the Sixth Circuit before this district court can consider a second or successive application for habeas relief. Assuming for the sake of discussion that this claim was not barred as a successive habeas application, Thompson still would not be entitled to any habeas relief because the claim is procedurally defaulted.

1. Procedural Default

Section 2254(b) limits a federal court's jurisdiction to hear a habeas claim to those cases in which a petitioner has exhausted all available state court remedies. To exhaust these state remedies, the petitioner must have presented to the state courts both the legal basis of the claim for which he seeks habeas relief and the factual basis of the claim. *Gray*, 518 U.S. at 162-63 (stating that the exhaustion requirement is not satisfied "by presenting the state courts only with the facts necessary to state a claim for relief"), *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The factual allegations made in federal court must be the same factual allegations made in state court, and the substance of a federal habeas claim presented to the federal court must first be presented to the state court. *Picard*, 404 U.S. at 276.

When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts

without presenting each factual claim. *Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). Moreover, each factual claim must be presented to the state courts as a matter of specific federal law. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made"); *Gray*, 518 U.S. at 163 ("It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court"); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court").

If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for that default. *Edwards v. Carpenter*, 529 U.S. 446 (2000); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Although Thompson asserts that he presented this claim to the state court in 2004 and 2005, and the Court decided the claim in 2004 but did not address it

in 2005, Thompson fails to explain what the state court concluded in 2004, and this Court has been unable to locate the state court's decision on this claim. It does not appear that this issue was addressed by the state courts as it was not presented to the state court in the 2004 proceedings. The scattered record references Thompson cites, in an effort to demonstrate exhaustion, relate to his request for a certificate of commutation in connection with his initial opposition to the setting of an execution date in February 2004, his subsequent motion to stay based on a change in his mental health status in October 2005, and unrelated issues in the Tennessee Supreme Court's 2004 opinion [Court File No. 41, at 102]. The Court does find this claim was properly raised in the subsequent motion to stay based on a change in his mental health status in October of 2005. Because Thompson failed to make an evidentiary showing sufficient to warrant consideration of a subsequent *Ford* claim, no additional legal claims were properly before the state court.

However, even assuming *arguendo,* that the claim is not barred for the reasons discussed above, the claim is time-barred under § 2244(d)(1)(A) because it was raised in this habeas court more than one year from the date on which the state-court judgment at issue in this matter became final and it does not relate back to the original habeas corpus petition filed in this matter. Fed. R. Civ. P. 15(c). Thompson's initial petition raised the claim of whether the state court's decision that Thompson failed to meet the "threshold showing" to warrant an evidentiary hearing, which in effect held Thompson was competent to be executed. However, in this claim, Thompson is seeking to carve out a new category of the mentally ill for whom the death penalty

is impermissible. Consequently, this claim does not relate back to his original habeas petition and is time barred.

Accordingly, Thompson is not entitled to habeas relief on this claim because it constitutes a second or successive petition, it is procedurally defaulted, and time barred, thus requiring its **DISMISSAL**.

C. Executing the Chemically Competent is Unconstitutional

In his third claim, Thompson claims any appearance of competency he may have is nothing more than an artificial, chemically-created competence. He further claims that not only is it "savage and inhuman" to forcibly medicate a person into competency for the purpose of execution, but that it is also unconstitutional. The State maintains Thompson has procedurally defaulted this claim and, in the alternative, the State maintains it is untimely. The Court agrees that the claim has been defaulted and is untimely, but also finds that it is does not state a claim.

1. Procedural Default

As noted, a procedural default occurs when a petitioner, who cannot show cause and prejudice, fails to fairly present his claim to the state courts before offering it as a federal constitutional violation in a habeas proceeding. *Murray v. Carrier*, 477 U.S. 478, 484 (1986). Thompson does not raise here the claim he raised in his state-court competency proceedings. Contrary to Thompson's assertion, the state-court record clearly demonstrates Thompson's default.

During his initial challenge to his competency to be executed in state court, Thompson recited his history of mental illness, including his regimen of medications, but he did not raise the fact that the antipsychotic medications were being administered or the surrounding circumstances as a federal constitutional matter. He did offer the claim to the state court in his "Notice of Change in Mental Health Status." But this was not a proper avenue for raising such a claim. This is so because the sole purpose of the Notice was to allow Thompson to provide proof demonstrating his mental health had substantially changed since the previous determination of competency was made. *Van Tran*, 6 S.W.3d at 272.

Not surprisingly, the Tennessee Supreme Court did not address the claim when disposing of Thompson's Notice of Change in Mental Health, as it was not properly before that Court. Thompson should have raised this claim in his initial petition challenging his competency to be executed, and not in his Notice. Consequently, Thompson failed to fairly present this claim in his state competency proceedings. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) ("fair presentation" requirement not satisfied where a claim is offered to state courts in a procedurally inappropriate manner which renders consideration on its merits unlikely). Petitioner's failure to fairly present this claim in a procedurally appropriate manner in the state courts has resulted in a procedural default, for which no cause and prejudice has been shown, much less alleged. Absent such a showing, the claim cannot be entertained in this habeas proceeding.

However, even if the claim were not procedurally defaulted, there are two reasons why Thompson would

not be entitled to habeas relief. First of all, his claim is time-barred under 28 U.S.C. § 2244. Secondly, Thompson has failed to state a constitutional claim.

2. Timeliness of Claim

Under 28 U.S.C. § 2244(d)(1)(A), a petitioner is afforded one year from the date on which the state court judgment becomes final, by the conclusion of direct review or the expiration of the time for seeking such review, within which to raise his constitutional challenges to that judgment in federal habeas proceedings. The Tennessee Supreme Court entered its judgment on Thompson's initial competency-to-be-executed petition on May 12, 2004. The ninety day period during which Thompson could have sought certiorari review of the decision in the United States Supreme Court expired on August 12, 2004, at which point the state court judgment would have become final. Thus, Thompson had until August 12, 2005, to raise his chemical-competency claim. Thompson filed his initial petition in this case on June 14, 2004, but did not include any such a claim. Thompson raised the claim in this district court in his amended petition on March 17, 2006 [Court File No. 41] Though a later-raised claim is itself considered timely if it merely amplifies a claim raised in a timely petition, Thompson's chemical-competency claim rests upon a totally different legal theory and factual basis than did his competency-to-be-executed claim. *See Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 249 (6th Cir. 2000) (citing Moore's Federal Practice § 15.19 [2], at 15-82 (3rd ed. 1999) ("Amendments that amplify or restate the original pleading or set forth facts with greater specificity should relate back."). Therefore, since the chemical-competency claim does not "relate

back" to the original habeas petition, *see* FED. R. CIV. P. 15(c), it is barred under § 2244 because Thompson raised it more than one year from the date on which the relevant state court judgment became final.

3. **Failure to State a Claim**

Thompson alleges that he is taking his medications involuntarily. His argument is this. Thompson's current regimen of medications, initially, were involuntarily administered. Thereafter, a conservator, who was appointed pursuant to the state's request, ordered that Thompson be given the medications. The conservatorship was terminated at the request of Thompson's counsel and, though Thompson has attempted to stop taking the medications, he has been unsuccessful because of the addictive nature of the medications and the effects of withdrawal. Additionally, in his unmedicated state, Thompson has been subject to physical abuse by prison guards and reasonably fears for his safety if he were to discontinue his medication. Therefore, according to Thompson, his ingestion of the medicine is not voluntary [Court File No. 41, at 107-08 (citations to record omitted)].

Though Thompson does allege that his addition stems from past state action, it is significant that he does not allege that, at the present time, state authorities are compelling him to take the medications.[17] Even if Thompson's addiction compels him to take antipsychotic medications and even if his addiction, in fact, resulted from being forced to take

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[17] Indeed, he only claims the State forcibly medicated him in 1995, 1999, and 2000 – six to ten years ago.

the medications, none of this states a claim. This is so because taking medications under the compulsion of an addiction does not violate constitutional guarantees.

Moreover, even if Thompson had demonstrated that the state authorities were actually forcing him to take the medications, he has not shown that executing him in his medicated state is unconstitutional. An individual has a liberty interest in "avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). Yet, when a person is confined in a state institution, individual liberties must be balanced against the interests of the institution in preventing the individual from harming himself or others residing or working in the institution. *Id.* at 222-23. In *Harper*, the Supreme Court applied the balancing test and concluded "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will [] if the inmate is dangerous to himself or others and the treatment is in the inmate's best interest." *Id.* at 227. The question presented in the instant case is different from that in *Harper* because the state is not forcibly medicating Thompson, rather, he is voluntary taking the medication, despite his argument to the contrary that he is being medicated involuntarily. Regardless of his personal reasons for taking the medication, the State is not administering the medication to Thompson against his will. Consequently, it is only the involuntary administration of antipsychotic medications by the government that implicates a constitutional right. *See Sell v. United States*, 539 U.S. 166, 178-79 (2003) (addressing issue of whether forced

administration of antipsychotic drugs to render defendant competent to stand trial unconstitutionally deprives him of his liberty to reject medical treatment.)

There is no United State Supreme Court nor Sixth Circuit authority deciding whether the constitution permits the involuntary administration of antipsychotic medication of a death row inmate to render the inmate competent for execution. Two state courts have concluded such a practice is prohibited but those courts have based their decision on state law grounds and not on the United States Constitution. *See State v. Perry*, 610 So.2d 746 (La. Sup. Ct. 1992); *Singleton v. State*, 437 S.E.2d 53 (S.C.Sup.Ct. 1993).

However, in *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.), *cert. denied*, 540 U.S. 832 (2003), the Eighth Circuit concluded that a state may execute a prisoner who has been involuntarily medicated under a *Harper* procedure consistent with the Constitution.[18] Singleton was under an involuntary-medication order which was

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[18] The *Singleton* case has been heavily criticized in numerous law review articles and other publications. *See, e.g.*, Jeremy P. Burnette, *The Supreme Court "Sells" Charles Singleton Short: Why the Court Should Have Granted Certiorari to Singleton v. Norris After Reversing United States v. Sell*, 21 Ga.St.U.L.Rev. 541 (2004); Lisa N. Jones, *Singleton v. Norris: The Eighth Circuit Maneuvered Around the Constitution by Forcibly Medicating Insane Prisoners to Create an Artificial Competence for Purposes of Execution*, 37 Creighton L.Rev. 431 (2004); Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath.U.L.Rev. 2269 (2005).

subject to annual review.[17] The *Singleton* court first addressed the issue of whether the state may forcibly administer antipsychotic medication to a prisoner whose date of execution has been set. Singleton argued that the involuntary medication regime, although initially legal, became illegal once an execution date was set because it was no longer in his best medical interest. The *Singleton* court "held that the mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set." *Id.* at 1026.

Singleton also claimed that the Eighth Amendment prohibited the execution of a prisoner who is "artificially competent." The *Singleton* court found that the state was under an obligation to administer antipsychotic medication, and any additional motive or effect was irrelevant. The Court concluded that "[a] State does not violate the Eighth Amendment as interpreted by *Ford [v. Wainwright*, 477 U.S. 399 (1986)] when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care." *Id.* at 1027.

However, as set forth above, there is no persuasive evidence before this Court that Thompson is being forcibly medicated by the State of Tennessee to render him competent to execute. Therefore, the facts do not warrant a decision on the *Harper-Singleton* issue, even if Thompson were to overcome his procedural default and the statute of limitations.

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[17] During the time of his appeal, his doctors did not renew the order and Singleton was taking his medications voluntarily.

As a final observation, the Court notes that Thompson has been medicated for years as he has been a danger to himself in the past and the medication has been provided to treat his mental illness. This is not an instant where the state has just begun to medicate Thompson so as to render him competent to be executed. In Thompson's case, he participated in the conservatorship proceedings which authorized the medication on grounds other than for the purpose of making him competent to execute. Nowhere in the record is there any evidence that Thompson pursued a claim in state court attempting to cease forcible antipsychotic medication. As a matter of fact, the most recent affidavit from Dr. Sultan, petitioner's expert, reflects that during their July 28, 2005 meeting, Thompson "had recently requested additional medication to assist him in coping with these hallucinations and depressive thoughts. According to the medical records, additional medication has, in fact, been provided to Mr. Thompson in response to his request." [File No. 17, Attachment A].

As previously observed, there is no Supreme Court precedent which holds that it is unconstitutional to execute a chemically-competent inmate or one who has regained competency through forced medication. Accordingly, Thompson has not demonstrated he is entitled to habeas relief on this claim as he has procedurally defaulted this claim, is time-barred from raising this claim, and in the alternative, has failed to direct the Court to any Supreme Court precedent which holds it is unconstitutional to execute a chemically-competent inmate under the facts presented in this case.

D. Execution Violates International Legal Obligations

Thompson argues his execution will violate international legal obligations binding on the United States. Thompson asserts that on April 1, 2004, the Inter-American Human Rights Commission of the Organization of American States ("Commission") requested the government of the United States to take urgent measures necessary to prevent the State of Tennessee from carrying out the execution of Gregory Thompson which was then scheduled for August 19, 2004. Thompson recently filed a reply to the State's answer to his second amended petition [Court File No. 48]. In his reply, Thompson asserts the international community recently made public its universal condemnation of Thompson's execution, and this claim is now ripe for review. Thompson claims the findings of the Commission in his case are an authoritative determination of the United States' binding obligations under international law. According to Thompson, a State which fails to stay an execution while a case is pending with the Commission violates international law.

1. Second or Successive Habeas Application

The claim presently pending before this Court is Thompson's competency-to-be-executed claim. Thompson's claim that his execution would violate international legal obligations constitutes a successive habeas application under § 2244(b)(2). As such, this Court lacks jurisdiction to adjudicate this claim at this time. Thompson must first obtain authorization from the Sixth Circuit before this Court is permitted to consider the merits of this claim. Accordingly, this

Court concludes Thompson has failed to present any evidence showing that this claim is cognizable in this competency-to-be-executed habeas petition.

2. **Procedural Default**

Petitioner's international law claim is procedurally defaulted. Thompson has never properly presented this claim to the Tennessee courts for consideration. In his appeal from the Coffee County Circuit Court's rejection of his claim of incompetency, Thompson did not raise this claim. Although on April 2, 2004, Thompson filed a document entitled "Notice of Inter-American Human Rights Commission of the Organization of American States Request of the United States to Take Precautionary Measures to Prevent the State of Tennessee from Carrying out the Execution of Gregory Thompson Presently Scheduled for August 19, 2004 and Request for Stay of Execution," he never raised an international law claim as a basis for relief from his death sentence in the Tennessee state courts. Indeed, the Tennessee Supreme Court disposed of Thompson's claim by denying his motion "requesting a stay of execution to allow the Commission time to consider his petition[.]" *Thompson v. State*, 134 S.W.3d at 176.

This claim was presented in State court as a request for a stay of execution pending the Commission's disposition of Thompson's petition. However, the Tennessee Supreme Court did discuss the request and stated international treaties are not binding upon it. Thompson claims this holding demonstrates he has exhausted his remedies and the claim is properly before the Court. Assuming Thompson is correct, his request for habeas relief

would still be denied because he has failed to demonstrate that the state court's conclusion that international treating are not binding in this situation is contrary to, or an unreasonable application of federal law.

Accordingly, in addition to this claim constituting a second or successive habeas petition under § 2244(b)(2), because Thompson never properly raised his international law claim in competency proceedings in state court, it is procedurally defaulted. In the alternative, Thompson has failed to demonstrate the State court's conclusion that international treaties are not binding upon it in this situation is contrary to or an unreasonable application of federal law. This claim will be **DISMISSED.**

E. Present Insanity Hearing

Thompson asserts that he is entitled to a federal evidentiary hearing to determine his present competency. Thompson claims the state court did not render judgment on the Eighth Amendment issue nor did it provide adequate proceedings. Thompson contends that, as in *Ford,* no state court issued any determination to which the presumption of correctness should apply. Thompson's assertions are incorrect.

The *Ford* Court observed that "[i]f federal factfinding is to be avoided, then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts." *Ford,* 477 U.S. at 411. As this Court has previously discussed in this opinion, Tennessee's procedures for determining competency to execute in

Thompson's case satisfied the requirements of *Van Tran* and *Ford*. The state court concluded Thompson failed to meet the threshold showing that his competency was genuinely at issue, and he subsequently failed to demonstrate a substantial change in his mental health,[20] both of which necessarily mean he is competent to be executed. Therefore, in compliance with *Ford*, the state court provided a judgment on the constitutional question.

Consequently, Thompson's assertion that the state court failed to render a judgment on the Eighth Amendment issue is incorrect. The state court rendered a judgment on Thompson's Eighth

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[20] Initially, Thompson's execution date was stayed by this Court pending disposition of a federal habeas petition under 28 U.S.C. § 2254 challenging the state court's competency determination and by the United States Court of Appeals for the Sixth Circuit in a decision purporting to vacate its previous decision affirming the dismissal of Thompson's first federal habeas petition. Subsequent to both stays being lifted, the Tennessee Supreme Court re-set Thompson's execution date for February 7, 2006. On September 29, 2005, Thompson filed a motion in the Tennessee Supreme Court requesting a stay of execution, citing a substantial change in his mental health status since the Court's previous competency determination. On October 18, 2005, the Tennessee Supreme Court allowed Thompson until November 18, 2005, to submit any further affidavits in support of his claim of a substantial change in mental health status. On November 18, 2005, Thompson submitted a "Supplemental Filing in Support of Mr. Thompson's *Ford / Van Tran* Claims."

After consideration of Thompson's original Notice of Change in Mental Health Status, his supplemental filings, and the State's response, the Tennessee Supreme Court denied Thompson's motion for stay of execution on December 13, 2005, finding that he failed to show that there has been "a substantial change in his mental health since the previous determination of his competency.

Amendment competency-to-be-executed claim and substantial-change claim when it concluded Thompson failed to meet the threshold showing that his competency was a genuine issue and when it concluded Thompson failed to show a substantial change in his mental health.

1. State Court Imposed an Unjustified Presumption of Competency

Thompson contends there is no background of prior competency to justify the state court requiring him to make a "threshold showing" that his competency is in question. Thompson asserts the state court's application of the threshold was unreasonable because there was no pre-trial hearing on competency. Moreover, Thompson claims that given his twenty-year history of mental illness, deference to a presumption of competence was wrong and requiring him to satisfy a heightened "threshold showing" was unjustified and unreasonable. Contrary to Thompson's argument attacking the presumption of his competency, and as previously addressed in this opinion, the state court correctly presumed he was competent since there is no record of any adjudication of his incompetency.

In a separate concurring opinion in *Ford v. Wainwright*, 477 U.S. 398, 425 (1986), Justice Powell explained that when a death-sentenced inmate has been judged competent to stand trial or his competency was sufficiently clear so as not to raise a serious question for the trial court, then the state may properly presume the petitioner remains sane at the time sentence is to be carried out and require a substantial threshold showing of insanity merely to trigger the hearing process. Thompson again confuses

his mental illness with competency. Thompson's history of mental illness does not render him incompetent.[21] Consequently, Thompson's mental illness does not prevent the state court from presuming he is competent or excuse him from the requirement that a petitioner must make a threshold showing that his alleged incompetency is genuinely at issue.

Thompson claims he has been certified incompetent on at least two occasions. However, the records before this Court reflect that his allegation is inaccurate. Thompson refers the district court to Court File No. 30, File 8 which consists of the Technical Record. The first three pages to which Thompson refers the Court, pages 89-91, consists of a Certification of Mental Emergency (p. 89), a Mental Health Emergency Medication Form (p. 90), and a Mental Health Treatment Plan (p. 91). Although the Court was unable to decipher some of the writing on the forms, it does not appear that any of the forms certify Thompson incompetent. Thompson also referred the Court to page 124 which is a Problem Oriented-Progress Form. The Problem Oriented-Progress Form did not reflect that Thompson was certified incompetent. The documents found on page 151-153 in File No. 9 consists of a letter from Dr. Arney recommending Thompson for conservatorship and a couple of reports, none of which certify Thompson as incompetent.

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[21] For a discussion of Thompson's prior legal proceedings where he raised a claim of competency, *see* Claim A.6.c.(3), Unreasonable Application of Presumption of Competency, supra.

Thompson confuses his mental illness with competency. The fact that Thompson suffers from mental illness does not mean he is incompetent. Questions about Thompson's mental health have been raised throughout his criminal, post-conviction, and habeas proceedings; however, the record does not reflect that Thompson has ever been found incompetent during any of those proceedings. Consequently, the state court's decision presuming Thompson to be competent and requiring Thompson to make a threshold showing that his competency is a genuine, disputed issue before conducting a hearing, was not unreasonable.

2. Satisfaction of "Threshold Showing"

Next Thompson asserts that he satisfied the threshold showing because he raised a genuine, substantial issue regarding his present sanity. The record reflects Thompson suffers from a long history of mental illness. However, the state court records, which include Thompson's Notice of Change in Mental Status [Court File No. 30, File 17] and the supplemental affidavits submitted by his experts, fail to meet the threshold showing that his competency to be executed is genuinely at issue. As previously discussed in this memorandum opinion, Thompson's expert evidence in his initial state proceeding raising his competency-to-be-executed claim revealed that although Thompson is mentally ill, he nevertheless, meets the competency-to-be-executed standard identified in *Ford* and *Van Tran*. Consequently, this Court has previously concluded that the State court's conclusion that Thompson failed to meet the threshold showing of a genuine issue regarding his present insanity was neither an unreasonable determination of the facts, nor was it

contrary to, or an unreasonable application of federal law. Nevertheless, the Court will address Thompson's claim that he made the threshold showing in his initial competency proceedings.

For a discussion of the documentation considered, and the Court's reasoning for concluding Thompson failed to meet the standard to make the required threshold showing *see* Claim A, *supra*. In addition, the Court will highlight the shortcomings of Thompson's proof showing why he failed to meet the threshold showing that his competency was a genuine issue.

First, Dr. Rabun's January 29, 2004 report, reflects that Dr. Rabun questioned Thompson about the reason for his incarceration and Thompson "readily admitted that he killed Brenda Lane" [Addendum No. 6, Exhibit 8, p. 7]. Thompson reported he and a female friend kidnaped Brenda Lane and he again reported he killed Brenda Lane. In addition, Thompson "indicated that he was convicted of 'First Degree Murder' and during the 'second phase' was sentenced to 'death'" [Addendum No. 6, Exhibit 8, p. 7]. Dr Rabun noted four facts which suggested Thompson was competent to be executed: 1) Thompson stated executions in Tennessee are by lethal injection or the electric chair; 2) Thompson stated he was convicted in 1985 of killing the victim, Brenda Lane; 3) Thompson told Dr. Rabun he received the death penalty during the second phase of his trial; and 4) Thompson stated he knew the State of Tennessee was seeking to execute him [Addendum No. 6, Exhibit 8, p. 12].

Although Dr. Rabun lists eight factors which he suggests indicate Thompson lacks the capacity to be executed based on numerous delusional beliefs, Dr.

Rabun's report ultimately reflects that Thompson knows the State of Tennessee is seeking to execute him because he murdered Brenda Lane. That is all that is necessary to demonstrate Thompson is competent to execute.

Dr. Woods report was unhelpful to Thompson because Dr. Woods failed to address the critical inquiry under *Van Tran* of whether Thompson is aware of the fact of his impending execution and reason for it. Dr. Sultan's report reflects that although Thompson has delusional beliefs relating to the State's ability to carry out the execution he is aware he has been sentenced to death for committing murder. Consequently, there is evidence in the record to support the conclusion that Thompson is aware of his punishment and the reason for it– the State seeks to execute him for the murder of Brenda Lane.[22] Thompson's delusional beliefs do not demonstrate he is unable to understand that he is facing execution for murdering Brenda Lane. Accordingly, Thompson has not met the required threshold showing and this claim will be **DISMISSED.**

3. Evidentiary Hearing

Thompson maintains that he is entitled to an evidentiary hearing because he cannot be charged with failing to develop his claim in state court since the state court denied him a hearing. Thompson contends

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[22] Just as an observation, the Court notes that Thompson attached a newspaper article dated February 2, 2006. The article reflects that during his interview Thompson acknowledged he murdered Ms. Lane and he is sentenced to death.

the petition alleges facts that, if proved, entitle him to relief. Moreover, Thompson asserts he presented a factual basis of his Eighth Amendment claim to the state courts but the state denied him a full and fair hearing; denied him access to information which was in the state's possession and which would have leant support to his claims; and denied him an adequate proceeding with a qualified judge.

Thompson argues, quoting *Ford* "[w]ithout some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent." *Ford,* 477 U.S. at 415. Thompson relies upon this quote to support his contention that the state court denied him an evidentiary hearing and, his argument that he is entitled to an evidentiary hearing in this Court. However, this quote is taken out of context. This quote is found in a portion of the *Ford* opinion discussing a flaw in the Florida procedure denying a petitioner the opportunity to challenge or impeach state-appointed psychiatrists' opinions by engaging in cross-examination of the psychiatrists to seek the "truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report.... The failure of the Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made

in reliance on those experts will be distorted." *Ford*, 477 U.S. at 415.

Thompson's reliance on this portion of the *Ford* opinion is unavailing since there were no state-appointed psychiatrists for Thompson to cross-examine. The State did not submit any evidence during Thompson's state court competency proceedings. The only psychiatric evidence submitted were the reports from Thompson's experts. Moreover, the only evidence presented in the state court competency proceedings was evidence submitted by Thompson. Consequently, there were no psychiatric opinions or any other evidence for Thompson to challenge.

In proceedings to determine a prisoner's competency to be executed, courts usually consider the testimony and records from several qualified mental health experts, each offering his or her own version of an inmate's level of mental illness. However, the judge must make the ultimate decision of competency. The record supports the conclusion of the trial judge and the Tennessee Supreme Court that Thompson failed to meet the required threshold showing to warrant an evidentiary hearing. Thompson was given the opportunity to develop his claim in State court. Under the circumstances of Thompson's case, the lack of evidence to support his claim does not equate to a denial of an opportunity to develop his claim in State court, but rather, demonstrates he is competent to be executed.

In compliance with *Ford*, the competency procedures outlined by the Tennessee Supreme Court in *Van Tran* and implemented in Thompson's state

court proceedings, provided sufficient due process to Thompson. The most demanding standard of minimum procedural requirements for competency proceedings was espoused by the plurality opinion in *Ford,* which was authored by Justice Marshall. Justice Marshall suggested that the state competency procedures must permit the prisoner faced with execution to submit material relevant to the competency determination, give the inmate an opportunity to challenge or impeach the State's mental health evidence through cross-examination, and include a judicial determination of the issue of competency. *Ford,* 477 U.S. at 413-416. However, Justice Marshall made it clear that he was not suggesting "that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 416-17.

The record reflects that Tennessee Courts provided Thompson all the Due Process constitutionally required for him to present his competency-to-be-executed claim and his change-in-competency claims. The fact that Thompson failed to satisfy the threshold showing of present incompetence or change in competency, does not render Tennessee's procedures inadequate or ineffective to safeguard his substantive Eighth Amendment rights. Thompson has failed to demonstrate any deficiency in Tennessee's procedure, as set forth in *Van Tran* or as applied in his case, that prevented him from developing the factual basis of his claim in state court so as to justify an evidentiary hearing in this Court. Moreover, Thompson has failed to present any evidence which necessitates an evidentiary hearing in this Court.

The Court has previously concluded, in this memorandum opinion, that the state court decision was neither an unreasonable determination of facts nor contrary to, or based upon an unreasonable application of federal law as determined by the United States Supreme Court. This Court permitted Thompson to obtain limited discovery from the State. At this time, Thompson has not notified this Court of any discovery of evidence relevant to his competency or which would provide support for his claims. Therefore, Thompson has not demonstrated that an evidentiary hearing is required under the circumstances of this case. Accordingly, Thompson is not entitled to such a hearing.

IV.
CONCLUSION

In addition to concluding that Thompson's State court proceedings satisfied Ford's Due Process requirement, the Court also concludes that the State court decisions on Thompson's competency-to-be-executed claim and his substantial-change-in-mental-status claim were neither contrary to, or an unreasonable application of federal law, nor an unreasonable determination of the facts. Accordingly, Petitioner is not entitled to an evidentiary hearing, and his § 2254 petition will be **DISMISSED.**

A separate Final Order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No. 1:04-cv-177
Edgar/Shirley

[Filed May 4, 2006]

GREGORY THOMPSON,	)
	)
Petitioner,	)
	)
v.	)
	)
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)
	)
Respondent.	)
	)

JUDGMENT ON DECISION BY THE COURT

This case came before the Court on the petition and amended petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Gregory Thompson. The Honorable R. Allan Edgar, United States District Judge, having rendered a decision,

It is **ORDERED and ADJUDGED** that the action be **DISMISSED WITH PREJUDICE** on the merits.

It is **FURTHER ORDERED and ADJUDGED** that under 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, a Certificate of Appealability is issued as to certain claims by the petitioner as outlined in the Court's Final Order and Certificate of Appealability.

The petitioner's execution was previously stayed pending further orders of this Court. The **STAY WILL REMAIN IN EFFECT** pending any appeal.

Dated at *Chattanooga, Tennessee,* this 4th day of May , 2006.

/s/ Patricia L. McNutt
PATRICIA L. McNUTT
CLERK OF COURT

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

No.4:98-cv-6
Edgar

[Filed March 27, 2006]

GREGORY THOMPSON,	)
	)
Petitioner,	)
	)
v.	)
	)
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)
	)
Respondent.	)
	)

MEMORANDUM AND ORDER

Petitioner Gregory Thompson ("Thompson") was convicted of first degree murder and sentenced to death by the Criminal Court of Coffee County, Tennessee. Thompson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which this Court dismissed on February 17, 2000 [Court File No. 124, 125]. Presently before the Court is Thompson's third motion for relief from judgment filed pursuant to

Rule 60(b) of the Federal Rules of Civil Procedure [Court File No. 163]. Petitioner relies upon the recent decision of the United States Supreme Court in *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005) (When a district court denies habeas relief on a "nonmerits" basis, the district court may address a Rule 60(b) motion when a petitioner alleges the district court erred in denying habeas relief on a "nonmerits" basis), and *Banks v. Dretke*, 540 U.S. 668 (2004) (The Supreme Court held that petitioner Banks had shown a *Brady* violation where the prosecution failed to disclose that one witness was a paid police informant, that another had been coached extensively by prosecutors, and that the informant had lied on the stand).

Thompson now makes several claims that he also raised in his original habeas petition; one group of claims were dismissed as procedurally defaulted and other group of claims were dismissed on other grounds. The Court will address the two groups in the order in which Thompson presented them in his motion.

1. Claims 22(8), 22(11), 22(12), and 22(21) Were Dismissed as Procedurally Defaulted

Thompson appealed the dismissal of his habeas petition and after an extensive procedural excursion through the appellate process, the United States Supreme Court denied Thompson relief, concluding the appeal of the dismissal of his original habeas petition on September 19, 2005. At the time this Court dismissed Thompson's § 2254 petition, the law in the Sixth Circuit provided that failure to raise a habeas claim to the Tennessee Supreme Court resulted in procedural default. Indeed, this Court dismissed

Claims 22(8), 22(11), 22(12), and 22(21) as procedurally defaulted and both the Court of Appeals for the Sixth Circuit and the United States Supreme Court denied Thompson relief on his appeal challenging this Court's dismissal of those claims as procedurally defaulted.

Subsequently, on June 28, 2001, the Tennessee Supreme Court enacted Tenn. S. Ct. R. 39, changing the landscape of the exhaustion law in Tennessee. Rule 39 provides:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Thompson contends Rule 39 was clarifying the state law that had existed since 1967 [Court File No. 163, at 8]. Thompson, relying upon the enactment of Tenn. S.

Ct. R. 39, has filed this Rule 60(b) motion and requests the Court to set aside its judgment dismissing Claims 22(8), 22(11), 22(12), and 22(21) and to reinstate his original habeas petition and adjudicate those claims.

Respondent asserts Rule 39 cannot create one of those extraordinary circumstances envisioned for Rule 60(b) relief as this has been the law since 1967. Moreover, Respondent contends Thompson should have challenged the Court's default determination on that basis in his appeal to the Sixth Circuit.

Thompson's Rule 60(b) motion challenging this Court's dismissal of certain procedurally defaulted claims addresses only a nonmerits aspect of his habeas petition. Challenging what he claims is a defect in the integrity of the federal habeas proceeding, *i.e.*, the Court's previous ruling of procedural default as to this claim, Thompson's motion is not the equivalent of a second or successive habeas petition. Thompson's motion does not litigate the merits of his habeas petition, but rather, asks this Court to reconsider its judgment that these claims contained in his habeas petition were procedurally defaulted. Therefore, as to his procedurally defaulted claims, Thompson has properly identified his motion as a Rule 60(b) motion.

Rule 60(b) provides that a final judgment or order may be set aside for the reasons enumerated in six subsections. Thompson has not identified the section of Rule 60(b) upon which he relies. Since his claim does not appear to fit sections one through five, the Court presumes petitioner relies upon section six which authorizes a United States District Court to grant relief from a final judgment for "any other reason justifying relief from the operation of the

judgment." Fed.R.Civ.P. 60(b)(6). Rule 60(b)(6) "applies only in exceptional and extraordinary circumstances." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001). Indeed, Supreme Court precedent requires "a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." *Gonzalez v. Crosby*, 125 S.Ct. at 2649 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

"[R]elief under Rule 60(b) is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir.), *cert. denied*, 534 U.S. 1054 (2001) (quoting *Waifersong Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). "[C]ourts must apply Rule 60(b)(6) relief only in 'unusual and extreme situations where principles of equity *mandate* relief." *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund*, 249 F.3d at 524 (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) (emphasis in original). A change in decisional law is usually not, by itself, an extraordinary circumstance meriting Rule 60(b)(6) relief. *Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Blue Diamond Coal Co. v. Trustees of the UMWA Comgined Benefit Fund*, 249 F.3d at 524. A change in decisional law must generally be "coupled with some other special circumstance" before relief under Rule 60(b)(6) will be granted. *Id.* Relief has been denied when changes in decisional law have been based on constitutional principles. In *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748-49 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996), the Fifth Circuit agreed with the state court's

refusal to vacate their prior judgment where they correctly applied federal law and a subsequent Supreme Court ruling changed the law.

Although there is law that "in the exceptional case . . . an action may be reinstated on account of an intervening change in the law" under Rule 60(b), *Harper v. Vaughn*, 272 F.Supp.2d 527, 532 (E.D.Pa. 2003) (citation omitted); *Cincinnati Ins. Co., v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998)(district erred in not granting Rule 60(b)(6) motion due to intervening change in law), and that a supervening change in governing law that calls into serious question the correctness of the court's judgment may constitute an extraordinary circumstance justifying relief, *Sargent v. Columbia Forest Prod., Inc.* 75 F.3d 86, 90 (2nd Cir. 1996); *Rashid v. Kuhlman*, 2000 WL 1855114, at *1 (S.D.N.Y. Dec. 19, 2000)(After dismissing a habeas petitioner as time-barred, the habeas petition was reinstated based on a subsequent change in the law by the Second Circuit), the Supreme Court's decision in *Gonzalez v. Crosby*[1] instructs that, under the circumstances of the instant case, the habeas petition should not be reinstated.

In *Gonzalez* the Supreme Court concluded that although Rule 60(b) was the proper procedure to seek relief from the District Court's previous finding that the petition was time-barred, Gonzalez was not entitled to any relief under Rule 60(b). Gonzalez's only ground for reopening the judgment denying his first federal habeas petition was the Supreme Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), where

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[1] 125 S.Ct. 2641, 2649 (2005)

the Supreme Court concluded that an application for state post-conviction relief was "properly filed," as required to toll the statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA) for filing habeas petition, even though the motion contained claims that were procedurally barred under state law. Almost nine months after the *Artuz* decision was rendered, Gonzalez filed a *pro se* Rule 60(b)(6) motion to alter or amend judgment contending that the district court's time-bar ruling was incorrect under *Artuz's* construction of § 2244(d). The district court denied the motion and Gonzalez appealed. The Supreme Court concluded *Artuz*'s change in the interpretation of the AEDPA statute of limitations did not constitute "extraordinary circumstances" as required for Gonzalez to prevail on Rule 60(b)(6) motion. The *Gonzalez* Court found that the District Court's interpretation of the AEDPA statute of limitations, at the time it rendered its decision, was correct under the circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). The Supreme Court concluded that it was not extraordinary that subsequently, after Gonzalez's case was no longer pending, the Supreme Court arrived at a different interpretation. The Supreme Court observed that:

> Although our constructions of federal statutes customarily apply to all cases then pending on direct review, see, *e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, . . .(1993), not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final. If *Artuz* justified reopening long-ago dismissals based on a lower court's unduly parsimonious interpretation of § 2244(d)(2),

> then *Pace v. DiGuglielmo*, 544 U.S. ___, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005), would justify reopening long-ago grants of habeas relief based on a lower court's unduly *generous* interpretation of the same tolling provision.

Gonzalez v. Crosby, 125 S.Ct. at 2650. The Court concluded "[t]he change in the law worked by *Artuz* is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue." *Id.* at 2651. Thus, the Court ruled *Gonzalez*'s "lack of diligence confirms that *Artuz* is not an extraordinary circumstance justifying relief from the judgment in petitioner's case." *Gonzalez*, 125 S.Ct. at 2651.

Thompson's situation is similar to the situation in which Gonzalez found himself, in that Thompson did not diligently pursue review of the procedural default issue. Although Tenn. S. Ct. R. 39 shows the error of this Court's previous procedural default ruling *i.e.*, that failure to seek review in the Tennessee Supreme Court resulted in procedural default at the time this Court issued its ruling, its interpretation was by all appearances correct under the Sixth Circuit's then-prevailing interpretation of what was required to exhaust state remedies. Indeed, the Court of Appeals for the Sixth Circuit and the United States Supreme Court denied Thompson relief when he appealed this Court's decision dismissing these claims as procedurally defaulted. Applying the Supreme Court's ruling in *Gonzalez* to Thompson, "it is hardly extraordinary that subsequently, after petitioner's case was no longer pending," the Tennessee Supreme Court" arrived at a different interpretation" of what constitutes procedural default.

Thompson has not raised and the Court has not found any special circumstance to permit the Court to grant any relief on the basis of the change in the Tennessee law regarding exhausting claims. Thompson has not presented any proof that enforcement of the original judgment would work an injustice. Considering this case in light of the decision rendered by the United States Supreme Court in *Gonzalez v. Crosby*, the change in Tennessee Supreme Court rule before this Court does not meet the extraordinary circumstance requirement of Rule 60(b)(6) relief.

Accordingly, the Court does not find that the change in Tenn. S. Ct. R. 39 constitutes an extraordinary circumstance which entitles Thompson to Rule 60(b) relief. However, assuming Tenn. S. Ct. R. 39 did qualify as an extraordinary circumstance and Thompson could prove enforcement of the Court's previous judgment dismissing these claims as procedurally defaulted would work an injustice, Thompson still would not prevail on his Rule 60(b) motion because he has failed to meet the "reasonable time" requirement in which to file the motion.

Assuming the extraordinary circumstance requirement that is needed to obtain relief under Rule (60)(b) is fulfilled by Rule 39, before petitioner is entitled to any relief he must also demonstrate his Rule 60(b)(6) motion was filed within a reasonable time. The reasonable time standard depends upon the factual circumstances of each case, "including length and circumstance of delay in filing, prejudice to opposing party by reason of the delay, and circumstance warranting equitable relief." *In re G.A.D., Inc.* 340 F.3d 331, 334 (6th Cir. 2003).

Therefore, the Court must scrutinize the particular circumstances of the case, and balance the interest of finality with the reasons for the delay.

Although Thompson diligently sought review of this Court's decision, he failed to diligently seek review when the Tennessee Supreme Court issued Rule 39. Rule 39 was enacted on June 28, 2001, and the Sixth Circuit initially issued its opinion on or about January 13, 2003, and certiorari was denied on or about December 1, 2003. However, on or about June 28, 2004, the Court of Appeals for the Sixth Circuit vacated its judgment and remanded the case to this Court. The United States Supreme Court reversed the Sixth Circuit's decision on August 29, 2005, and denied Thompson's petition for rehearing on September 19, 2005. Nevertheless, Thompson waited more than four and a half years after the enactment of Rule 39 and four months from the denial of certiorari before filing his Rule 60(b)(6) motion on January 20, 2006. Thompson has not provided any explanation for the delay. Thompson's filing of his motion more than one year after the enactment of Rule 39 demonstrates a lack of due diligence. Such a delay, without excuse, will ordinarily result in the denial of a Rule 60(b) motion. *See United States v. Mortgage Lenders Network USA, Inc.*, 234 F.3d 1270 (unpublished table decision), *available in* 2000 WL 1529815, at *3 (6th Cir. Oct. 5, 2000) (denied relief to MLN under Rule 60(b)(6) because MLN failed to adequately explain why it delayed for over a year after it learned of action before petitioning court); *Crosslin v. United States*, 2001 WL 863616, at *2 (N.D. Tex. July 13, 2001) (finding Rule 60(b) motion time-barred because defendant waited ten months after *Apprendi* decision); *United States v. $4,299.32 United States Currency*, 922

F.Supp. 430, 434 (W.D. Wash. 1996) (motion for relief filed over one year after date on which case altering decisional law was rendered, without explanation for the delay, was untimely).

Accordingly, the Court concludes that Thompson's Rule 60(b) motion challenging this Court's procedural default rulings was not made within a reasonable time, as required by the rule, when it was filed more than four years after the enactment of Rule 39. Consequently, Thompson's Rule 60(b) motion, to the extent it challenges this Court's rulings of procedural default is **DENIED** [Court File No. 7].

II. Claims 20, 20(g), and 21 Were Dismissed for Failure to Develop Evidence in State Court

Petitioner is challenging this Court's previous ruling, on certain issues, where the Court concluded Thompson was not entitled to any habeas relief. Thompson claims the Court must reconsider the adjudication of the following claims:

(1) Claim 20–denial of funding for experts at post-conviction;

(2) Claim 20(g)–denial of effective assistance of counsel based on lack of prejudice attributed to trial counsel's failure to investigate Thompson's mental state; and

(3) Claim 21–competency to stand trial and insanity at the time of the crime.

These claims were adjudicated by this Court and the denial of relief on these claims were affirmed by

the United States District Court of Appeals for the Sixth Circuit and the United Supreme Court. In effect, Thompson is attempting to relitigate these claims. Presumably Thompson is arguing that, in light of the Supreme Court's recent decision in *Banks v. Dretke*, 540 U.S. 668 (2004), this Court applied an incorrect legal standard in denying him habeas relief on the above reference claims.

Banks v. Dretke involved instances of egregious prosecutorial concealment of *Brady*[2] evidence and intentional misrepresentation. The *Banks* Supreme Court determined the state withheld evidence that would have allowed Banks to demonstrate the two essential prosecution witnesses had been coached by police and prosecutors before they testified and also that they were paid informants. In addition, prosecutors permitted testimony that they were not coached to stand uncorrected at trial. It does not appear that *Banks* changed the law, but rather, it simply applied the *Brady* rule to a particularly egregious set of facts. *See Curry v. United States*, 125 Fed.Appx. 67, 69 (7th Cir. 2005) (Unpublished). In *Banks* the Supreme Court reiterated the three components of a *Brady* claim. Although Thompson's claim is not a *Brady* claim, he apparently is relying upon the Supreme Courts statement in *Banks* that "[w]e assign no overriding significance to Banks's failure to invoke state-court assistance to which he had no clear entitlement." *Banks v. Dretka*, 540 U.S. at 697. Thompson argues his state attorneys repeatedly sought funding for a mental health expert, even though state law did not allow such funding.

---

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Once again, Thompson does not explicitly state which subsection of Rule 60(b) he believes this claim implicates, but it appears that the only arguably applicable language is that of Rule 60(b)(6) which allows the district judge to relieve a party from a final judgment for any "reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). As previously noted in this Order, relief under Rule 60(b)(6) is only appropriate in cases presenting "extraordinary circumstances" and Thompson has failed to show "extraordinary circumstances" justify the reopening of the final judgment in his original habeas case.

The Court previously considered and disposed of these three claims. For example, the Court determined Thompson failed to present any evidence, during his habeas proceedings, demonstrating he was mentally incompetent at the time he committed the crime or at the time of trial even though he claimed his recently obtained expert determined he was incompetent at the time of the crime and throughout his court proceedings. Thompson's expert testified during his state post-conviction hearing that she did not have an opinion about Thompson's diagnostic status in 1985. Moreover, in addition to Thompson failing to develop his claims in state court, he also failed to develop his claims in his federal habeas proceedings, despite the Court granting discovery and an opportunity to present evidence establishing a genuine factual dispute in response to the Warden's motion for summary judgment *See* [Court File Nos. 124 and 125]. Because these claims have been before the Court and expressly disposed of in the Court's denial of petitioner's original habeas petition, Thompson cannot now claim the Court never ruled on

them. Moreover, the Supreme Court *Banks v. Dretke* decision did not change the law this Court applied to Thompson's claims.

However, even assuming Thompson's argument is correct, it is immaterial because he has failed to meet the requirement that a Rule 60(b) motion must be filed within a reasonable time. Using the one-year statute of limitations applicable to habeas petitions as a guide, Thompson is not entitled to any Rule 60(b)(6) relief because his motion, which was filed more than a year from the date of the *Banks v. Dretke* decision, is time-barred as it was not filed within a reasonable time. The Supreme Court rendered its decision on February 24, 2004. Petitioner failed to initiate this Rule 60(b) motion until one year and two months after the Supreme Court rendered its decision in *Banks v. Dretke*. Thompson has not provided any explanation for the delay. Moreover, Thompson's filing of his motion more than one year after the *Banks* decision demonstrates a lack of due diligence. Consequently, Thompson failed to file his Rule 60(b) motion within a reasonable time and he has failed to show extraordinary circumstances justifying relief from judgment.

Accordingly, Thompson's Rule 60(b) motion is **DENIED** in its entirety [Court File No. 163].

III. Certificate of Appealability (COA) and *Informa Pauperis Status*

To grant a COA, the Court must find a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a claim has been dismissed on the merits, a substantial showing is made if jurists

of reason would find the district court's assessment of the constitutional claims debatable or wrong, or if jurists could conclude the issues raised are adequate to deserve further review. *See Miller El v. Cockrell*, 537 U.S. 322, 327 & 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim has been dismissed on procedural grounds, a substantial showing is demonstrated when it is shown reasonable jurists would debate whether a valid claim has been stated and whether the court's procedural ruling is correct. Although each prong of the test is part of the threshold inquiry, a court may dispose of the application by resolving the issue whose answer is more apparent from the record and arguments. *See Slack*, 529 U.S. at 475. The Court has individually assessed each claim under the above standards.

Jurists of reason would not find debatable or wrong, the Court's finding that Thompson's Rule 60(b) motion fails to present "extraordinary circumstances" justifying the reopening of the final judgement in the original habeas case and its alternate finding that the Rule 60(b) motion is time-barred, as it was not filed within a reasonable time from the alleged change in law or cases upon which Thompson relies. Nor would reasonable jurists conclude the issues raised are adequate to deserve further review. Therefore, if any appeal is taken from this action, such notice will be treated as an application for a certificate of appealability, which is hereby **DENIED** since Thompson has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Rule 22(b) of the FEDERAL RULES OF APPELLATE PROCEDURE.

In addition, the Court has reviewed this case pursuant to 28 U.S.C. § 1915(a)(3) and Rule 24 of the FEDERAL RULES OF APPELLATE PROCEDURE and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by Thompson for leave to proceed *in forma pauperis* on appeal is **DENIED.** 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24.

SO ORDERED.

ENTER this *27th day of March, 2006.*

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

No. M1987-00067-SC-DPE-DD

[Filed December 13, 2005]

STATE OF TENNESSEE	)
	)
v.	)
	)
GREGORY THOMPSON	)
	)

ORDER

On October 18, 2005, this Court entered an order holding in abeyance Gregory Thompson's subsequent Ford claim under Van Tran v. State, 6 S.W.3d 257, 272 (Tenn. 1999). Thompson was given until November 18, 2005, to submit any further affidavits in support of his claim of a change in his mental status; and the State was to file its response to such affidavits no later than December 2, 2005. On November 18, 2005, Thompson filed supplemental materials and affidavits relating to his Ford claim. On December 2, 2005, the State filed its response to the supplemental filings.

On November 18, 2005, Thompson also filed a Motion for Protective Order and Motion for Order Requiring Reciprocal Discovery, alleging that the

Office of the Attorney General was improperly obtaining access to his prison and medical records without judicial supervision and without reciprocal discovery. On December 2, 2005, the State filed its response to these two motions. On December 6, 2005, Thompson filed a reply to the State's response.

Upon due consideration of the original Notice of Change in Mental Health Status, the supplemental filings, and the State's response, the Court finds that Gregory Thompson has not shown that there has been a substantial change in his mental health since the previous determination of his competency that raises a substantial question about his present competency to be executed. The motion for stay of execution to allow consideration of the subsequent Ford claim is therefore DENIED.

Furthermore, after due consideration, the Motion for Protective Order and Motion for Order Requiring Reciprocal Discovery are DENIED.

PER CURIAM

Justice Adolpho A. Birch, Jr.– Dissenting

APPENDIX G

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

No. M1987-00067-SC-DPE-DD

[Filed February 25, 2004]

STATE OF TENNESSEE	)
	)
v.	)
	)
GREGORY THOMPSON	)
	)

ORDER

On January 21, 2004, the State filed a Motion to Set Execution Date for Gregory Thompson. The motion stated that Thompson had completed the standard three tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court Rule 12.4(A). On February 2, 2004, Gregory Thompson filed a Response Opposing Motion to Set Execution Date and Request for a Certificate of Commutation. On February 9, 2004, the State filed a Reply to Thompson's Response.

The Response to the State's Motion alleged that an execution date should not be set because Thompson is severely mentally ill. Thompson also requested that this Court issue a certificate of commutation to the

governor under Tenn. Code Ann. § 40-27-106 because Thompson's mental condition constitutes extenuating circumstances warranting commutation of his sentence to imprisonment for life. After careful review of the Response and the Request for Commutation and the supporting documentation and the State's Reply, the Court concludes that under the principles announced in Workman v. State, 22 S.W.3d 807 (Tenn. 2000), Thompson has presented no extenuating circumstances warranting issuance of a certificate of commutation. It is therefore ORDERED that the Request for a Certificate of Commutation is hereby DENIED.

On February 2, 2004, Thompson also filed a Notice of Incompetency to Be Executed Claim, in which he raised the issue of his present competency to be executed and requested a competency hearing under Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999). Upon consideration of the Notice and supporting exhibits, it appears to the Court that Thompson has raised the issue of his present competency to be executed in accord with the procedures adopted by this Court in Van Tran v. State. It is hereby ORDERED that the issue is remanded to the Circuit Court of Coffee County, where Thompson was originally tried and sentenced, for an expeditious determination of his present competency, including the initial determination of whether he has met the required threshold showing. These proceedings shall be conducted in accord with the procedures and time limits set forth in Van Tran v. State, which provides no more than fifty-five (55) calendar days for the conclusion of the trial court proceedings and the filing of an appeal in this Court.

It further appearing to the Court that a Motion for Appointment of Counsel was filed on January 30, 2004, the Court hereby appoints Michael J. Passino, 323 Union Street, Nashville, Tennessee 37201, as lead counsel to represent Thompson in the competency proceedings and in further proceedings in this Court in relation to the imminent execution. The Court also appoints the Office of the Public Defender for the Fourteenth Judicial District to serve as co-counsel in this matter.

Furthermore, after due consideration, the State's motion to set an execution date is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the nineteenth day of August, 2004, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Gregory Thompson shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the hverbend Maximum Security Institution.

PER CURIAM

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5744/5770

[Filed January 12, 2010]

GREGORY THOMPSON,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
RICKY BELL, WARDEN,	)
	)
Respondent-Appellee.	)
	)

O R D E R

BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-5770
Death Penalty Case

[Filed July 24, 2006]

GREGORY THOMPSON,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
RICKY BELL, Warden,	)
	)
Respondent-Appellee.	)
	)

PROTECTIVE APPLICATION FOR CERTIFICATE OF APPEALABILITY

COMES NOW Petitioner-Appellant, Gregory Thompson, through undersigned counsel of record, pursuant to 28 U.S.C. § 2253, and applies for a certificate of appealability ("COA") to appeal the

District Court's denial of his Rule 60(b), FED. R. CIV. P., motion.

INTRODUCTION

Death row inmate Gregory Thompson is psychotic and delusional. *Thompson v. State*, 134 S.W.3d 168, 179 (Tenn. 2004). His habeas petition raised mental health issues as well as allegations of ineffective assistance of counsel ("IAC") for failure to investigate and present the issue of Thompson's compromised mental state.

The district court dismissed several of the IAC claims on the ground that Thompson defaulted them in state court by not seeking discretionary review in the Tennessee Supreme Court. We now know, however, that this ruling was fatally wrong and in direct contravention of state law. *See* TENN. S. CT. R. 39 (stating criminal defendants do not have to seek discretionary review in order to fully exhaust their claims). Thompson filed a Rule 60(b) motion in district court arguing that the enactment of TENN. S. CT. RULE 39 qualified as an extraordinary circumstance warranting the reopening of the district court's judgment. The district court found Thompson filed a proper Rule 60(b) motion, but dismissed it, finding extraordinary circumstances had not been established and that the motion had not been filed timely. The court also denied a COA.

In adjudicating Thompson's habeas petition, the district court also found Thompson failed to develop several mental health and IAC claims in state court. 28 U.S.C. § 2254(e)(2). We now know, however, that when the state successfully argues against factual

development in state court, the state may not benefit in federal court from a finding of failure to develop under § 2254. *Banks v. Dretke*, 540 U.S. 668, 697 (2004). Thompson's Rule 60(b) motion alleged that the state argued against factual development in his case and he was denied funding for expert services. He alleged the district court proceedings were defective because of an erroneous analysis under § 2254(e)(2). The district court dismissed those arguments and denied a COA as well.

As explained below, Thompson asserts he has an appeal of right pursuant to 28 U.S.C. § 1293. Should this Court disagree and conclude a COA is required, Thompson alternatively asks for a COA.

ISSUES PRESENTED

I. Whether Thompson presented extraordinary circumstances warranting Rule 60(b) relief where:

a. We now know the district court misapplied Tennessee's law on exhaustion and thus illegally and erroneously failed to reach the merits of Thompson's claims, *see* TENN.S.CT.RULE 39;

b. We now know the district court erroneously found a failure to develop the facts supporting Thompson's claims, *see Banks v. Dretke, supra*;

c. Thompson is psychotic and delusional and the State of Tennessee successfully established Thompson's mental incompetence warranted a conservatorship;

d. Where the court's illegal failure to review properly presented claims will result in Thompson's loss of life; and,

e. Where seven out of twelve reviewing federal judges would grant relief.

II. Whether Thompson's Rule 60(b) motion was filed within a reasonable time where:

a. About one month after TENN.S.CT.RULE 39 was enacted, Thompson pursued the only avenue available in this Circuit to raise this issue by diligently informing this Court of the passage of TENN.S.CT.RULE 39 and its relevance to his case. (Case no. 00-5516, additional citation filed 8/1/01);

b. This Circuit did not recognize the propriety of such Rule 60(b) motions until December 2004. *Abdur 'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004);

c. The district court improperly dismissed the pending Rule 60(b) after the Supreme Court reversed the Sixth Circuit win;

d. Thompson raised his arguments based on *Banks v. Dretke, supra*, within months of the Supreme Court's reversal of the Sixth Circuit win; and,

e. The subsequent appellate rulings, twice, substantially altered the district court's judgment and triggered a new one-year time frame. The Rule 60(b) motion was filed less than two months after the district court judgment, at last, became final.

* * *

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(2)

No. 09-1373

Supreme Court, U.S.
FILED
JUL 12 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the Tennessee Supreme Court unreasonably applied *Ford v. Wainwright*, 477 U.S. 399 (1986), when it disregarded evidence of Thompson's delusions and long history of severe mental illness as "irrelevant" and failed to conduct a hearing before ruling Thompson competent to be executed.

2. Whether the court of appeals correctly concluded that promulgation of Tennessee Supreme Court Rule 39, which demonstrated that the district court misinterpreted state law at the time it dismissed habeas claims as procedurally barred in a capital case, was an extraordinary circumstance warranting relief under Rule 60(b)(6).

3. Whether the certificate of appealability allowed the court of appeals to consider fully the question whether to grant relief under Rule 60(b)(6).

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No. 09-1373

IN THE

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RICKY BELL, WARDEN,

Petitioner,

v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 580 F.3d 423. The opinion of the court of appeals denying rehearing and rehearing en banc (Pet. App. 179a-80a) is unreported. The memorandum opinion and order of the district court regarding Thompson's *Ford* claim (Pet. App. 66a-155a and Pet. App. 156a-57a, respectively) are unreported. The memorandum order of the district court regarding Thompson's Rule 60(b) motion (Pet. App. 158a-73a) is unreported. The opinion of the Tennessee Supreme Court is reported at 134 S.W.3d 168.

JURISDICTION

The court of appeals entered judgment on September 11, 2009, and denied rehearing and rehearing en banc on January 12, 2010. On April 7, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 5, 2010. On May 7, 2010, Justice Stevens further extended the time to file the petition to and including May 10, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The petition presents no question warranting this Court's review. The petition does not identify any conflict in the lower courts over any of the questions presented. And although the State asserts that the decision below conflicts with this Court's decisions, that assertion falls of its own weight, as the State acknowledges that the facts and law of the case differ from those involved in this Court's decisions.

The decision below is also highly fact-bound and has little effect beyond this case. The competency-to-be-executed claim at issue in the first question presented was adjudicated in state court before this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which will be the relevant standard for future cases. The decision of the court of appeals to afford relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure at issue in the second question presented involves the application of a single state's procedural rule under the unique circumstances of this case, where the adoption of that rule confirmed that the district court's prior decision dismissing ha-

beas claims as procedurally barred was erroneous at the time it was issued. And the third question presented involves the scope of the certificate of appealability (COA) and the particular factual circumstances under which it was issued below. None of these narrow and fact-bound questions warrants review.

The decision below also remands the case for further proceedings, rendering the petition interlocutory and premature. Those proceedings in the district court may very well either alter the nature of the questions presented or render the State's arguments moot altogether. For example, if the district court affords relief on Thompson's previously (and wrongly) barred ineffective-assistance claims, the competency-to-be-executed claim will become moot. There is thus no warrant for this Court's review at this time.

Even if error-correction of a fact-bound decision of limited significance that does not implicate any conflict in the lower courts could warrant review, the court of appeals faithfully applied this Court's decisions and reached the correct result on the facts presented, and so there is no error to correct. This Court squarely rejected the State's contention that *Ford v. Wainwright*, 477 U.S. 399 (1986), does not constitute "clearly established law" under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, in *Panetti*. And the Tennessee Supreme Court violated the clearly established law in *Ford* in precisely the same way as the lower court in *Panetti*. Specifically, it relied on Thompson's mere awareness of the execution and the State's reason for

it when *Ford* requires an examination into his rational understanding. The Tennessee Supreme Court also excluded evidence of Thompson's delusions and history of mental illness, which *Ford* clearly makes relevant to the inquiry, and it failed to hold the hearing required by *Ford* after Thompson made a substantial threshold showing of incompetency.

The decision below also correctly afforded Thompson the opportunity to pursue certain ineffective-assistance claims in federal court for the first time. In adopting its Rule 39, the Tennessee Supreme Court confirmed that the district court erred *at the time it issued its decision* in dismissing those claims as procedurally barred. Although development of the law over time is common and does not typically constitute an "extraordinary" circumstance sufficient to reopen a judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, a state supreme court's confirmation of the fact that a federal court, at the time it issued its decision, misapplied state law in barring constitutional claims in a capital case is both rare and extraordinary. Thompson also acted diligently in pursuing those claims, and could not have sought Rule 60(b)(6) relief earlier, as the State suggests, because then-controlling circuit court precedent would have deemed a motion to reopen a judgment to be a successive habeas petition.

Finally, the State's claim that the court of appeals exceeded the scope of the COA misses the mark. The court of appeals granted a COA on the question "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary

circumstance *sufficient to warrant* re-opening Thompson's original § 2254 petition," Pet. App. 65a (emphasis added), a question that, as this Court already held in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), logically encompasses the question whether the habeas petitioner acted diligently in seeking relief. The State's cramped and contrary reading would render the court of appeals' decision to grant the COA an academic exercise and its later decision an advisory opinion.

For these reasons, certiorari should be denied.

STATEMENT

Thompson suffers from schizophrenia, and he is both delusional and psychotic. He was charged with first-degree murder in 1985 in Coffee County, Tennessee. Thompson's counsel failed to adequately investigate the issue of his mental illness. At trial, his counsel conceded guilt, called no witnesses, and presented no proof. The jury found Thompson guilty of first-degree murder, a capital crime. The jury imposed the death penalty, and the trial court sentenced Thompson to death.

A. Thompson's Competency To Be Executed

1. On January 21, 2004, the State moved to set Thompson's execution date. Thompson opposed the motion on the ground that he was incompetent to be executed. The Tennessee Supreme Court set an execution date, but remanded the case to the trial court to evaluate Thompson's competency claim.

2. In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death

upon a prisoner who is insane." *Id.* at 409-10. The Tennessee Supreme Court responded by adopting a substantive state-law standard for competency, as well as the procedures by which a prisoner sentenced to death can assert a claim of incompetency. *See Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Under that standard, a prisoner is not competent to be executed if he "lacks the mental capacity to *understand* the fact of the impeding execution and the reason for it." *Id.* at 266 (emphasis added). The state requires a prisoner asserting that he is incompetent to be executed to file a petition in the state trial court "clearly set[ting] forth the facts alleged to support the claim that execution should be stayed due to present mental incompetence," and attaching "affidavits, records or other evidence supporting the factual allegations of mental incompetence." *Id.* at 267. If the prisoner "make[s] a threshold showing that he . . . is presently incompetent," the court must hold a hearing at which the prisoner "shall be allowed to present all evidence material and relevant to the issue of competency." *Id.* at 269, 271.

3. On March 1, 2004, in accordance with *Van Tran*, Thompson filed a petition seeking a hearing on his competency to be executed. He provided eighteen exhibits documenting his severe mental illness throughout his years in custody and his present incompetency to be executed. The exhibits included (1) portions of Thompson's prison mental-health records; (2) affidavits from three mental-health professionals who had recently evaluated Thompson; and (3) documents revealing that the State had previously considered him incompetent and sought appointment of a conservator to oversee his affairs.

a. The medical records Thompson submitted showed that he had been diagnosed in prison as "schizophrenic, paranoid type" and as having "bipolar affective disorder." Pet. App. 4a. The records also documented Thompson's "mood swings," the fact that he hears voices, and that he has repeatedly engaged in acts of self-harm, including "swallowing poison, cutting his wrists and arms, and burning his hand and face." *Id.* These records also cataloged Thompson's severe and pervasive delusions, including his beliefs that he is God and in control of the world, J.A. 06-5744, at 1111-12, that he will get out of prison because "Big Bird is on his side," *id.* at 1120, or because he is a wealthy songwriter, *id.* at 1063, and that the woman he was convicted of murdering is an employee at the prison special-needs facility where he is housed, *id.* at 1124-25.

b. Thompson also submitted reports from three mental-health professionals who evaluated him in the months preceding the petition. The first report was from Dr. Rabun, a forensic psychiatrist. Dr. Rabun reviewed Thompson's medical records and trial transcripts, and interviewed him twice. Those interviews showed that Thompson has been hearing voices since at least the time of his conviction, and that the voices diminish when he takes his antipsychotic medication. Pet. App. 5a. Thompson related a number of his delusions to Dr. Rabun, including that he is a famous songwriter who has "written many of the songs heard on the radio"; that he has "buried a large stash of money, gold bars, and a 'Grammy Award' near" a church in Georgia; and that he is a lieutenant in the Navy and his conviction will be

overturned once his Navy records are discovered. *Id.* at 5a-6a; *see also* J.A. 06-5744, at 439-42.

When asked by Dr. Rabun, Thompson admitted that he had killed a woman, but explained at length that his work in the Navy would result in his conviction being overturned and that his "'one million dollars,' the 'Grammy Award,' and the 'gold bars,' buried near a church in Georgia" were "mitigators," which, if presented to the court, would make him a "free man." J.A. 06-5744, at 442-43, 447. And while Thompson indicated that he had been sentenced to death, Dr. Rabun explained that "he holds the delusional perception that he will not be executed" because of the "mitigation" evidence in his favor. *Id.* at 448. Thompson also told Dr. Rabun that execution by electrocution will not kill him. As Thompson explained to Dr. Rabun, "I am used to being shocked, every time I touch my TV, I get shocked, [and] when I went to a chiropractor in 1982, he twisted my neck, and it felt like a shock." *Id.*

Based on his interviews with Thompson and review of Thompson's medical records, Dr. Rabun diagnosed Thompson as suffering from "Schizophrenia, Undifferentiated Type, Continuous" and concluded that "Thomson lacks the mental capacity to *understand* the fact of the impending execution and the reason for it." J.A. 06-5744, at 444, 449 (emphasis added).

The second report came from Dr. Woods, a psychiatrist who interviewed Thompson for three hours and reviewed his medical records and trial testimony. J.A. 06-5744, at 462. Dr. Woods noted that "even after being found competent to control his own

psychiatric treatment, and being compliant with [his] treatment, Mr. Thompson remains so grossly psychotic that only the most superficial interrogation would not only reveal his profound psychosis, but his current incompetency." *Id.*

Dr. Woods' interview with Thompson revealed that Thompson "believes that he can not die, and there will be a two year period in which he will stay alive, even if he were executed," after which point "a decision will be made whether he will go to Hawaii or 'Gangster's Paradise.'" J.A. 06-5744, at 463, 466. Thompson also expressed some of the same delusions as he had to Dr. Rabun, including that he cannot die from electrocution and that he will be exonerated by a military tribunal because of his Navy records. *Id.* Based on the interview with Thompson and review of his records, Dr. Woods concluded that Thompson suffers from schizophrenia that "is severe and ongoing" and that he "is currently incompetent to be executed." *Id.* at 462.

The third report came from Dr. Sultan, a clinical psychologist, who conducted eleven psychological examinations of Thompson from 1998 until 2004. Pet. App. 7a; J.A. 06-5744, at 485. Dr. Sultan reported that Thompson has suffered from schizophrenia since at least early adulthood and that he "has experienced the delusions, hallucinations, disorganized thinking, and disorganized speech and behavior" characteristic of schizophrenia. J.A. 06-5744, at 485. Dr. Sultan observed that, without his medication, Thompson is "floridly psychotic . . . . unaware of his surroundings" and "the reason for his incarceration, the sentence he has received, or the fact of impend-

ing execution." *Id.* at 486. Dr. Sultan concluded that, in an unmedicated state, Thompson is not competent to be executed because he "clearly d[oes] not understand that the State [i]s seeking to execute him or that his death would be the consequence of such an execution." *Id.* Even with medication, Dr. Sultan reported that Thompson suffered from the delusions described by Drs. Rabun and Woods, and on this basis Dr. Sultan concluded that Thompson "lacks the capacity to understand the fact of his scheduled execution or the reason for it." *Id.* at 487.

c. In addition to his medical records and the three psychiatric reports, Thompson provided the trial court with evidence that, in 2001, the State sought to appoint a conservator to make medical decisions for Thompson, effectively conceding his incompetence. In its papers, the State argued that Thompson suffers from "a long history of Bipolar Disorder and psychotic symptoms," that his "illness is chronic and fluctuating in nature" and that he is "incapable of rational thought" and "has minimal insight into the presence of his illness." J.A. 06-5744, at 721. The State asked that a conservator be appointed to oversee Thompson's medical and psychiatric treatment, including the use of forced medication. *Id.* at 722. The conservator was appointed, and conservatorship continued until October 2003, when it was terminated because Thompson began voluntarily taking his medication.

4. In response to the petition, the State did not dispute the facts just described, nor did it present any evidence to counter Thompson's evidence of incompetency. Instead, the State contended that the

evidence, even if taken as true, did not establish that Thompson was unaware of the fact of his execution or the reason for it. J.A. 06-5744, at 524.

5. Three days after Thompson filed his petition and eighteen exhibits, the trial court denied the petition without holding a hearing. Pet. App. 8a; J.A. 06-5744, at 560-63. In a three-page order, the trial court ruled that Thompson is "aware of the fact of his impending execution and the reason for it," and that he was not entitled to a hearing to develop his incompetency claim. J.A. 06-5744, at 561-62.

6. The Tennessee Supreme Court affirmed, concluding that "[w]hile Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding [his] competency" sufficient to warrant a hearing. *Thompson v. State*, 134 S.W.3d 168, 183 (Tenn. 2004). In the court's view, competency only required Thompson to be "aware of the *fact* of his . . . impending execution and the *reason* for it." *Id.* at 184. In finding Thompson competent, the court rejected evidence of his delusions and history of mental illness as "irrelevant" to his claim. *Id.* at 177.

Justice Birch dissented in part, concluding that Thompson was entitled to a hearing on his competency claim. *Thompson*, 134 S.W.3d at 185. In his view, Thompson's "voluminous evidence of mental illness dating back at least eighteen years" and reports from "three highly qualified experts" explaining that Thompson "suffer[s] from severe, ongoing schizophrenia, and currently 'lacks the mental capacity to *understand* the fact of the impending execution and the reason for it'" satisfied the threshold

showing sufficient to warrant a hearing. *Id.* at 185-86 (emphasis added). Justice Birch observed that the majority had elevated the "threshold showing" into a requirement of "conclusive proof." *Id.*

7. On June 14, 2004, Thompson filed a federal habeas petition asserting that he was not competent to be executed. The case was stayed pending resolution of other proceedings, which culminated in *Bell v. Thompson*, 545 U.S. 794, 813-14 (2005).[1]

When the district court returned to the petition in 2005, Thompson's mental health had further deteriorated. The district court lifted the stay of execution to allow the State to set a new execution date, which would also allow Thompson to present his changed mental-health circumstances to the Tennessee Supreme Court. Pet. App. 10a. The state court again denied his claim, and Thompson returned to the federal district court. On May 4, 2006, the district court dismissed Thompson's habeas petition but issued a certificate of appealability. *Id.* at 11a-12a. Petitioner filed a timely appeal.

8. The court of appeals reversed. It concluded that the Tennessee Supreme Court unreasonably applied *Ford* when it rejected evidence of Thompson's severe delusions and documented history of mental illness as "irrelevant" to his competency

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[1] The State's prior appeal to this Court concerned the propriety of the court of appeals' *sua sponte* decision to withhold its mandate without alerting the parties and its decision to issue an amended opinion after this Court declined to review the initial panel opinion and after the State commenced further proceedings in state court. It has no bearing on the issues involved at this stage.

claim. Pet. App. 19a. It further concluded that "[r]egardless of whether Thompson's incompetency petition should be granted, his evidence has at least created a genuine issue about his competency, and therefore warrants an evidentiary hearing." *Id.* at 20a. The court of appeals accordingly remanded the case to the district court to hold a hearing on Thompson's competency to be executed.

B. Thompson's Rule 60(b) Motion

1. In his original federal habeas petition, Thompson asserted that his counsel had been ineffective in failing to present evidence of his mental health at trial and sentencing. Pet. App. 12a. Thompson had raised this and three other ineffective-assistance claims in post-conviction proceedings in the state trial court, and had sought appellate review of them in the Tennessee Court of Criminal Appeals. But he had not sought discretionary review of these claims in the Tennessee Supreme Court, instead filing a federal habeas petition.

2. In February 2000, the district court dismissed Thompson's habeas petition, rejecting the four ineffective-assistance claims as procedurally barred because Thompson had failed to seek discretionary review of them in the Tennessee Supreme Court. Thompson requested a certificate of appealability on the procedurally barred claims, but it was denied. *See* Docket 00-5516, 5/24/00 Application for a COA.

3. In June 2001, after the district court dismissed Thompson's habeas petition but while his other claims were pending in the court of appeals, the Tennessee Supreme Court promulgated Rule 39, which provides, in relevant part, that:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

The Tennessee Supreme Court promulgated Rule 39 in response to this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). In *O'Sullivan*, this Court held that exhaustion of state remedies under AEDPA "require[s] state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." *Id.* at 847. The Court recognized that some states might have rules providing that a particular remedy is not available and concluded that "nothing in the exhaustion doctrine require[s] federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48. Rule 39 is precisely that sort of rule.

When it enacted Rule 39, the Tennessee Supreme Court expressly stated that it was not changing the law, but merely *clarifying* that it had never required an application for discretionary relief from the state supreme court for habeas-exhaustion purposes:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. *In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby* [adopt] *Rule 39.*

See In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies (Tenn. June 28, 2001) (*quoted in Adams v. Holland*, 330 F.3d 398, 405 (6th Cir. 2003)) (emphasis added). The advisory committee notes to the Tennessee Rules of Appellate Procedure also confirm that Rule 39 "works no change" in the rules governing appeal to the Tennessee Supreme Court. *See Adams*, 330 F.3d at 405. Accordingly, the adoption of Rule 39 confirmed that the district court's decision dismissing Thompson's claims as procedurally barred was erroneous even at the time it was issued.

4. Thompson promptly notified the court of appeals of the issuance of Rule 39 and the district court's error in dismissing his ineffective-assistance claims as procedurally defaulted. *See* Docket 00-5516, 8/1/01 Docket Entry. Thompson did not (and could not) immediately seek Rule 60(b)(6) relief in the district court, because controlling circuit court authority at that time would have deemed such a motion to be a successive habeas petition. *See McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir.

1996). The court of appeals initially affirmed dismissal of Thompson's habeas petition in January 2003. It later amended its ruling, and this Court reversed. *Thompson*, 545 U.S. at 796.

5. Six weeks after the case was remanded to the district court, Thompson filed a motion under Federal Rule of Civil Procedure 60(b), explaining that Rule 39 presented an extraordinary circumstance warranting reopening of his habeas petition. Pet. App. 13a. While the district court acknowledged that Rule 39 "shows the error of th[e] Court's previous procedural default ruling," *id.* at 165a, it denied the motion to reopen, concluding that Rule 39 was not "an extraordinary circumstance" and that Thompson's motion had not been filed within a "reasonable time," *id.* at 166a. The district court declined to issue a certificate of appealability on the claim. *Id.* at 172a.

6. Thompson sought a certificate of appealability in the court of appeals on the Rule 39 issue, asking the court of appeals to certify whether he had presented extraordinary circumstances warranting Rule 60(b) relief and whether the Rule 60(b) motion had been filed in a reasonable time. Pet. App. 183a-84a. The court of appeals issued a certificate of appealability on the following question: "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition." *Id.* at 65a.

7. The court of appeals consolidated Thompson's Rule 60(b) appeal with his appeal on his competency-to-be-executed claim. Pet. App. 13a-14a. The court

of appeals held that promulgation of Tennessee Supreme Court Rule 39 was an extraordinary circumstance, because it confirmed that the district court's prior decision dismissing the ineffective-assistance claims as procedurally barred was always incorrect as a matter of law. The court also noted that Thompson had promptly brought the matter to its attention, and held that the reasons for any delay in filing a Rule 60(b) motion were "understandable" given the unique circumstances of the case and did not "detract from the extraordinary circumstance reflected in the promulgation of [Rule] 39." *Id.* at 35a-36a. Accordingly, the court of appeals remanded with instructions for the district court to consider the ineffective-assistance claims for the first time.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION ON THOMPSON'S *FORD* CLAIM

A. The Decision Below Is Interlocutory, Fact-Bound, Does Not Implicate Any Conflict In The Lower Courts, And Has No Significance Beyond This Case

The narrow decision of the court of appeals remanding the case for a hearing on Thompson's competency to be executed does not warrant this Court's review. The claim arises in an interlocutory posture and may be mooted on remand. The decision does not conflict with any decision of this Court or any lower court, and, in any event, it is both fact-bound and of limited (if any) significance beyond the facts of this case.

1. The competency claim is not presently ripe for this Court's review. After concluding that the Tennessee Supreme Court had unreasonably applied *Ford v. Wainwright*, 477 U.S. 399 (1986), the court of appeals remanded the case to the district court to "decide the merits of [Thompson's] incompetency claim *de novo*." Pet. App. 21a. The *Ford* claim thus arises in an interlocutory posture, which "alone furnishe[s] sufficient ground" to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). And where a "Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

This case illustrates the reasons for that prudential rule. In remanding the case, the court of appeals directed the district court to "*first* rule on the merits of Thompson's remaining ineffective assistance claims" and "*only* address the incompetency question if [the district court] rejects the ineffective assistance claims." Pet. App. 37a-38a (emphases added).[2] Ac-

[2] This sequence makes good sense for two reasons. First, the district court's erroneous interpretation of state exhaustion law categorically prevented Thompson from presenting his ineffective-assistance claims in *any* federal forum for over ten years. While nothing can cure that delay, expeditious consideration by the district court at least will not further extend it. Second, it conserves judicial resources. If the district court rules in Thompson's favor on one or more of the ineffective-assistance

cordingly, if the district court grants one or more of Thompson's claims of ineffective assistance of counsel, the State's *Ford* argument could become moot. And even if the district court rejects Thompson's ineffective-assistance claims and holds a competency hearing, the State's argument could still prove moot if the district court concludes that Thompson is competent to be executed. On the other hand, if the district court concludes that Thompson is not competent to be executed, the State may then pursue avenues of appropriate appellate relief, including ultimately a petition for certiorari to this Court. Review at this time is thus premature and unwarranted.

2. The court of appeals' decision is also of limited applicability and, accordingly, does not raise an important question warranting this Court's review. The State contends that the court of appeals misread *Ford* in remanding the case for a hearing on the competency claim. Even if that were true (and it is not, as explained below), it is irrelevant beyond this case because this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which further explains the tenets of *Ford*, guides all state-court decisions since *Panetti* was issued in 2007. Since a capital prisoner cannot even raise the claim that he is incompetent to be executed until the state sets an execution date, virtually *all* of the relevant state-court decisions involved in other capital cases will postdate *Panetti* and thus be adjudicated under that standard.

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claims and concludes that he is entitled to further proceedings in state court, that decision could obviate the need for a competency hearing.

3. Additionally, review is unwarranted because the court of appeals' decision is not in conflict with any decision of this Court or any court of appeals. Indeed, the State does not identify any conflict in the lower courts over the question presented. That alone warrants denying review.

Instead, the State contends that the decision below conflicts with *Williams v. Taylor*, 529 U.S. 362 (2000), because *Williams* defines "clearly established" federal law under AEDPA, and the State argues that *Ford* does not contain any clearly established federal law. But that contention is meritless. Although *Williams* describes AEDPA's requirements, the decision below arises on entirely different facts, involves distinct legal issues, and does not conflict with *Williams*. On the contrary, as the State concedes elsewhere, it is *Ford* (not *Williams*) that sets forth both the substantive Eighth Amendment standard prohibiting execution of the "insane" and the minimum procedures a state must provide to give effect to the substantive prohibition. *Ford*, 477 U.S. at 409-10; *see also id.* at 424, 426 (Powell, J., concurring). And this Court has already held that *Ford* constitutes "clearly established federal law" under AEDPA. *See, e.g.*, *Panetti*, 551 U.S. at 949. The State's attempt to manufacture a conflict with *Williams* thus fails.

B. The Decision Below Is Correct On The Merits

1. The State's principal position is not that any of the traditional factors warranting this Court's review are satisfied here, but that the court of appeals simply erred in remanding the case for a hearing on

Thompson's *Ford* claim. That is not a sufficient basis for certiorari review. But even if it were, the decision below is correct on the merits. The court of appeals correctly determined that the Tennessee Supreme Court unreasonably applied clearly established federal law, specifically *Ford*, when it rejected Thompson's competency claim without a hearing and refused to consider evidence of his delusions and history of mental illness.

In *Ford*, this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. Once a prisoner "makes a substantial threshold showing of insanity," he is entitled to a "fair hearing" on his competency claim. *Id.* at 424, 426 (Powell, J., concurring). As this Court recognized in *Panetti*, *Ford* is the clearly established law under which competency-to-be-executed claims arising under AEDPA must be evaluated. *See Panetti*, 551 U.S. at 948.

2. *Panetti* also explains that it is error under *Ford* for a state to reject a petitioner's delusions and history of mental illness as categorically "irrelevant" to the competency claim and to fail to hold a hearing when the prisoner carries his threshold burden.

With regard to the delusions and history of mental illness, *Panetti* explains that "[i]t is . . . error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." 551 U.S. at 960. Applica-

tion of such a categorical standard would allow for execution even where the State's interest in, for example, retribution, is not served because the "prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.* at 958-59. *Ford* thus prohibits states from using a standard that "automatically forecloses" inquiry into incompetency once the court has found that the prisoner "can identify the stated reason for his execution." *Id.* at 959.

Panetti also explains that under *Ford*, once the prisoner makes a threshold showing of incompetency, he is entitled to certain procedures, including a hearing. 551 U.S. at 948. The failure to provide those procedures is a violation of the clearly established federal law in *Ford*. *See id.* at 948.

3. Based on the foregoing, the Tennessee Supreme Court unreasonably applied *Ford* when it denied Thompson's competency claim without a hearing.

a. The standard the Tennessee Supreme Court used in Thompson's case was an unreasonable application of *Ford*. The state court said that Thompson "need only understand *or be aware of* the fact of his impending execution and the reason for it" to be deemed competent, and that evidence of delusions and a history of mental illness were "irrelevant" once those two prongs were established. *Thompson*, 134 S.W.3d at 183 (emphasis added). But by excluding evidence of Thompson's delusions and history of mental illness, the Tennessee Supreme Court made

the same categorical mistake as the lower court in *Panetti*. In particular, excluding that evidence wrongly equates fleeting factual awareness of the execution and the reason for it with rational understanding. But "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959.

Indeed, the decision below differs from the Tennessee Supreme Court's own decision in *Van Tran*, where it held that "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to *understand* the fact of the impending execution and the reason for it." 6 S.W.3d at 266 (emphasis added). By replacing the word "understand" with the phrase "understand or be aware of," the Tennessee Supreme Court unreasonably applied not only *Ford* but *Van Tran* itself.[3]

b. The error of the Tennessee Supreme Court is compounded by the fact that the court denied the claim without a hearing. Thompson provided the state court with copious documentation of his long history of mental illness, including prison medical records, three psychiatric reports, and records showing that the State had previously found him incompetent and sought a conservator. Two of the expert affidavits Thompson submitted specifically concluded that he does not understand the fact of the execution and the reason for it. Pet. App. 6a-8a. Accordingly, as the court of appeals recognized, "[t]he evidence Thompson submitted was undoubtedly a

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[3] Thus, even if *Van Tran* is an appropriate application of *Ford*, the Tennessee Supreme Court failed to apply it correctly here.

'substantial threshold showing,' and therefore an evidentiary hearing should have been held." *Id.* at 20a.

The need for a hearing here is all the more clear when this case is compared to *Panetti*. This Court explained there that its "independent review of the record," which consisted of "a letter and a declaration from two individuals, a psychologist and a law professor, who had interviewed petitioner [once] on death row," and "references to the extensive evidence of mental dysfunction considered in earlier legal proceedings," "verified" that petitioner "had made a 'substantial threshold showing of insanity.'" *Panetti*, 551 U.S. at 938, 950. If the record in *Panetti* was sufficient to satisfy the substantial threshold showing, the record here easily clears the same hurdle. By denying Thompson's request for a hearing after he satisfied the threshold showing, the state court applied *Ford*'s procedural mandate in an unreasonable manner.

c. The State argues that the Tennessee Supreme Court's determination was not unreasonable because Thompson's delusions "do not 'prevent[] him from *comprehending* the reasons for the penalty or its *implications*' or undermine his fundamental appreciation of the connection between crime and punishment." Pet. 28-29 (quoting *Ford*, 477 U.S. at 417) (emphases added). But that assertion only repeats the error of the Tennessee Supreme Court. "There is, in short, much in the record to support the conclusion that petitioner suffers from severe delusions." *Panetti*, 551 U.S. at 956. Among other things, those delusions lead Thompson to believe

that he will be exonerated through a military tribunal. He also believes that the State's means of executing him (electrocution) will not work, either because he can withstand electrocution, or because he will go to Hawaii or "Gangster's Paradise." These are not mere "unorthodox beliefs" about what Thompson thinks will happen after he dies. *Thompson*, 134 S.W.3d at 183. To the contrary, they are manifestations of Thompson's "psychotic disorder" and prevent him from understanding that the State intends to execute him because he was convicted of murder. *Panetti*, 551 U.S. at 960. The overwhelming evidence in the record demonstrates that Thompson's gross delusions "put an awareness of a link between a crime and a punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. The court of appeals' decision to remand for a hearing is thus correct on the merits.

4. a. The State contends that *Ford* did not set forth any substantive standard for competency and thus "logic dictates that the Tennessee Supreme Court could not have unreasonably applied it in [Thompson's] case." Pet. 27. As already described, that does not call into question the court of appeals' determination that the Tennessee Supreme Court unreasonably applied Justice's Powell's controlling procedural opinion in *Ford* by concluding that Thompson did not even make a substantial threshold showing. Even if it did, the State errs in contending that until this Court sets forth a precise substantive standard for determining competency to be executed, there is no "clearly established law" by which to review the competency determination by the Tennes-

see Supreme Court.

To begin, *Panetti* already refutes this assertion. There this Court explained that *Ford* "constitutes 'clearly established law' for purposes of § 2254." 551 U.S. at 949. Justice Powell's concurrence "sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim," *id.* at 949, and the majority provides that the Eighth Amendment "'places a substantive restriction on the State's power to take the life of an insane prisoner,'" *id.* at 957 (quoting *Ford*, 477 U.S. at 405).

Nor was it necessary to await *Panetti* in order to decide that, under *Ford*, "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford*, 477 U.S. at 409-10. This substantive constitutional restriction provides a clear mandate to the States to ensure they do not execute those rendered incompetent by reason of mental illness, regardless of how the State chooses to define the precise competency standard. It is well established that "[r]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams*, 529 U.S. at 382. The State's selection of a competency standard is thus clearly bounded by the Eighth Amendment as clearly established under *Ford*.

b. The State objects (Pet. 27) to the court of appeals' reference to *Panetti*, arguing that *Panetti* does "not qualify as 'clearly established Federal law' with respect to" this case because it post-dated the Tennessee Supreme Court's ruling on Thompson's com-

petency hearing. This is a red herring. The court of appeals did not say that *Panetti* constitutes the clearly established law governing the case; on the contrary, it relied on *Ford*. Pet. App. 15a. Nevertheless, as described above, *Panetti* (another AEDPA case) is *relevant* because it describes *Ford* in a way that conclusively establishes the Tennessee Supreme Court's unreasonable application of *Ford* itself.

Accordingly, the Court should deny review on the *Ford* claim.

II. THE COURT OF APPEALS' RULE 60(B) DECISION PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW

A. The Rule 60(b) Decision Does Not Implicate Any Conflict In The Lower Courts, Is Fact-Bound, And Has No Significance Beyond This Case

There is also no reason for this Court to review the court of appeals' conclusion that promulgation of Tennessee Supreme Court Rule 39 constitutes, as applied here, an "extraordinary circumstance" justifying relief under Federal Rule of Civil Procedure 60(b)(6). That decision does not conflict with any decision of this Court or implicate any conflict in the court of appeals. It also both turns on a narrow state-law issue with limited applicability to other cases and involves a fact-specific determination about Thompson's diligence in pressing his claim, and does not warrant review.

1. The question whether Tennessee Supreme Court Rule 39 forms the basis for Rule 60(b)(6) relief

from an erroneously dismissed habeas claim has, perhaps literally, *no* applicability outside the facts of this case. Research by the undersigned suggests that Thompson may very well be the *only* habeas petitioner currently maintaining a Rule 60(b)(6) motion based on the issuance of Rule 39 in federal court in Tennessee. In one other case, the court granted the motion to reopen under Rule 60(b)(6) and the movant's claims have since been resolved. *See Abdur'Rahman v. Bell*, No. 96-0380, *available at* 2008 WL 2002572 (M.D. Tenn. May 7, 2008). And Thompson is likely to be the last. Rule 39 was promulgated over nine years ago, and it is thus difficult to imagine a Rule 60(b)(6) motion filed on the basis of Rule 39 and satisfying the diligence requirement at this point. Review is unwarranted to address a legal issue with no application beyond this case.

2. Nor is there any reason to review the fact-bound determination of the court of appeals that the particular facts of this case satisfy Rule 60(b)'s "extraordinary circumstances" test. Like the decision concerning Rule 39 itself, the question whether Thompson satisfied the Rule 60(b)(6) requirement of "extraordinary circumstances" is a fact-bound inquiry that presents no compelling legal question. Pet. App. 33a. As the court of appeals explained, such decisions are made on a "case-by-case inquiry that requires the trial court to intensively balance numerous factors." *Id.* This Court need not concern itself with such a fact-bound claim. *See* Sup. Ct. R. 10.

3. The court of appeals' ruling also does not con-

flict with any decision of this Court or any other lower court. Indeed, the State does not even attempt to assert that the court's decision remanding Thompson's ineffective-assistance claims conflicts with the decision of any other lower court.

To be sure, the State contends that the court of appeals' decision conflicts with this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), but it plainly does not. As described further below, *Gonzalez* addressed different circumstances and does not remotely control the resolution of this case. The State simply objects to the manner in which the court of appeals applied *Gonzalez* to the facts of this case, which is no reason for the court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."). And, unlike *Gonzalez*, which involved a federal-law basis for reopening a judgment, the decision below does not have national ramifications or indeed any ramifications beyond this case.

B. The Rule 60(b) Decision Is Correct On The Merits

Even if error-correction were a valid basis for seeking this Court's review, certiorari would be inappropriate here because the court of appeals reached the correct result.

1. Thompson was wrongly deprived of the opportunity to pursue four ineffective-assistance claims when the district court found those claims procedurally barred after Thompson did not seek discretionary review in the Tennessee Supreme Court. The Tennessee Supreme Court's promulgation of

Rule 39 made the district court's error apparent and, as the court of appeals recognized, constituted an "extraordinary circumstance" warranting reopening of Thompson's capital habeas petition under Rule 60(b)(6) to reinstate his never-considered ineffective-assistance claims. Absent that remand, Thompson would be categorically (and erroneously) barred from ever presenting those claims in a federal forum.

2. Additionally, relief is appropriate because Thompson was diligent in pursuing his claims. The State erroneously contends (Pet. 34) that Thompson "waited" four years before seeking relief on the basis of Rule 39. The Tennessee Supreme Court promulgated Rule 39 on June 28, 2001, while Thompson's habeas case was pending in the court of appeals. Final briefs had already been filed in the case, so Thompson notified the court of appeals by filing a notice of supplemental authority on August 1, 2001, just one month after Rule 39 was adopted. In issuing its opinion on January 9, 2003, the court of appeals did not address Thompson's notice.

At that point, Thompson could not have sought Rule 60(b)(6) relief in the district court, because circuit court precedent categorically treated Rule 60(b) motions as second or successive habeas petitions. *See McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), *overruled by Abdur'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004) (en banc). The en banc court in *Abdur'Rahman* reversed *McQueen* in December 2004, holding that Rule 60(b) motions were not second or successive petitions. By that point, Thompson and the State were litigating related claims on appeal. Once that appeal was complete and jurisdic-

tion was returned to the district court in January 2006, Thompson promptly filed the present Rule 60(b) motion. Thompson thus pressed the Rule 39 issue diligently throughout the proceedings.

3. Contrary to the State's argument (Pet. 31-37), *Gonzalez* is not in tension with the court of appeals' conclusion that Thompson established extraordinary circumstances. In *Gonzalez*, the district court dismissed petitioner's habeas petition as time-barred under AEDPA, but, after the judgment became final, the Supreme Court interpreted a related provision of AEDPA in a way that would have rendered the petition timely. The petitioner sought relief under Rule 60(b)(6), but this Court concluded that he had not demonstrated "extraordinary circumstances" warranting relief because: (1) the district court's ruling was *correct* when it was issued; and (2) petitioner had not been diligent in pressing his claim. *Gonzalez*, 545 U.S. at 536-37. In the Court's view, these two factors militated against a finding of "extraordinary circumstance[s] justifying relief from the judgment in petitioner's case." *Id.*

a. *Gonzalez* is grounded in the notion that the law is constantly evolving, and it would disserve finality and efficient court administration to allow a litigant to set aside a ruling that was *correct* at the time it was issued simply because there is a subsequent change in the law. 545 U.S. at 536. Accordingly, because "[t]he District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation" of the statute, it was "hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court ar-

rived at a different interpretation." *Id.*

In contrast with *Gonzalez*, the present case does not involve a *change* in the law, but rather a *clarification* by the Tennessee Supreme Court about the state of the law as it had been since 1967. The clarification made it unmistakably clear that the district court's decision dismissing Thompson's ineffective-assistance claims for failure to seek discretionary review was a legally erroneous interpretation of Tennessee state law *at the time the decision was issued*.[4] It is indeed the rare and extraordinary case where a state's highest court confirms that a federal district court misinterpreted state law in dismissing capital habeas claims as procedurally barred.

b. The State also overlooks the fact that *Gonzalez* concerned a change in the federal courts' interpretation of a federal statute, and thus did not implicate the important considerations of comity and federalism that are in abundance when looking at the intricate interplay of state and federal schemes of post-conviction relief. Here, in contrast, Thompson has been barred from raising these claims for ten years because of an incorrect *federal* court decision misinterpreting a provision of *state* exhaustion law. Declining to correct this error, and declining to give supremacy to the state's view of its own law, upsets the precise balance between state and federal courts on which AEDPA's exhaustion requirements are based.

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[4] Thus, the State's argument (Pet. 33-34) that if a "*change* in the law will rarely constitute extraordinary circumstances . . . then logic dictates that a bid to reopen habeas proceedings on the basis of something *less than* a change in the law cannot possibly succeed," has it exactly backwards.

Specifically, AEDPA requires a state prisoner wishing to seek federal habeas review to exhaust available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). This "rule of comity" has been a fundamental part of federal habeas review since it was first announced in *Ex Parte Royall*, 117 U.S. 241, 252 (1886), in part because it "giv[es] the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks omitted).

If comity and federalism are served by a requirement that state prisoners exhaust their habeas claims in state court before proceeding to federal court, then those interests are actively disserved when a federal court declines to give effect to the state's laws defining exhaustion. *See Stringer v. Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law."). In this way, Rule 39 constitutes an extraordinary circumstance justifying relief under Rule 60(b)(6) in Thompson's case.

4. The State's additional assertion that its interest in finality has been impinged does not transform this question into one warranting review. Indeed, finality considerations weigh in favor of Thompson, not the State, in these narrow circumstances. As this Court has noted, the death penalty is "unique in both its severity and its finality." *Monge v. California*, 524 U.S. 721, 732 (1998) (internal quotation marks omitted). Thompson should be permitted to assert claims that he received ineffective assistance

during the proceedings that led to his death sentence and, thus, that he was deprived of the "fundamental right of criminal defendants[, which] assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

In these unique—indeed, extraordinary—circumstances, the court of appeals' decision to remand this case for consideration of the ineffective-assistance claims was correct and does not warrant review.

III. THE COURT OF APPEALS DID NOT EXCEED THE SCOPE OF THE CERTIFICATE OF APPEALABILITY

The court of appeals concluded that Thompson was entitled under Rule 60(b) to have the district court consider his ineffective-assistance claims in part because Thompson presented those claims in a timely fashion. The State now contends that that question was beyond the scope of the court of appeals' jurisdiction. This fact-bound argument does not warrant review and is without merit.

1. This question amounts to nothing more than a fact-bound claim about the wording of the COA and, accordingly, it does not warrant this Court's review. The State does not argue that the COA was issued under the wrong legal standard or otherwise presents an issue of national importance, as was the case in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Even if the State were correct that the court of appeals exceeded the scope of the COA, the State is seeking nothing more than error-correction, which is no reason to grant review.

That conclusion is particularly obvious here because this is a problem of the State's own making. If the State were concerned about the scope of the COA, it could have brought that to the attention of the court of appeals. The court, in turn, could have amended or expanded the COA or otherwise clarified that the timeliness question was properly before it. *See, e.g.*, *United States v. Shipp*, 589 F.3d 1084, 1087 (10th Cir. 2009); *Villot v. Varner*, 373 F.3d 327, 337 n.13 (3d Cir. 2004). Instead, the State failed even to alert the panel to this asserted issue in its briefing.

2. In any event, the timeliness question is within the scope of the COA. The court of appeals granted the COA on the question "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance *sufficient to warrant re-opening Thompson's original § 2254 petition*." Pet. App. 65a (emphasis added). As this Court recognized in *Gonzalez*, the question whether a habeas petitioner has been diligent in pursuing relief is subsumed within the question whether he has demonstrated an extraordinary circumstance warranting relief under Rule 60(b)(6). *See* 545 U.S. at 537-39 ("[Petitioner's] lack of diligence confirms" that there is no "extraordinary circumstance justifying relief from the judgment in petitioner's case."). The court of appeals likewise recognized the nested nature of the timeliness question, noting: "Although the Federal Rules do not mandate the specific time by which the motion must be filed, a movant's lack of diligence can detract from the extraordinariness of the circumstance." Pet. App. 35a.

Indeed, the State's contrary view would have

rendered the COA the court of appeals *did* issue an academic endeavor. If the State were correct that the court of appeals had no jurisdiction to consider whether Thompson acted diligently, it necessarily follows that the court of appeals would have had no jurisdiction to award relief, because even if adoption of Rule 39 were extraordinary, the court had no authority to determine whether Thompson acted diligently and was thus entitled to relief. The State's view thus renders the entire appeal an exercise in the issuance of an advisory opinion. There is no warrant for reading the COA to deprive jurisdiction from the very court that issued it.

3. Finally, even if there were any doubt whether the diligence question was fairly included within the COA, it is not unreasonable "to read [a] COA as including" both the certified question and a "closely related" issue. *Cornwell v. Bradshaw*, 559 F.3d 398, 412 (6th Cir. 2009). A helpful analogy is to this Court's consideration of issues within a question presented, in which "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). The question of Thompson's diligence in pressing his claims is plainly a "subsidiary question" within the "extraordinary circumstances" inquiry. *See Gonzalez*, 545 U.S. at 537-39.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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